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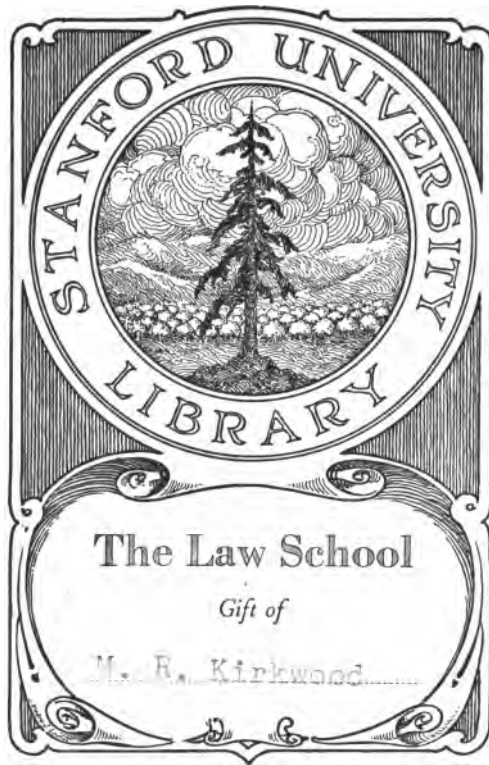
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SELECTED CASES ON EQUITY

BY

GEORGE L. CLARK

Author of "Principles of Equity"

PART I—CHAPTERS I TO IV.

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CASES ON EQUITY

PART 1.

CHAPTER I. INTRODUCTION

GWATHNEY v. STUMP.

(Supreme Court of Tennessee, 1814, 2 Tenn. (2 Overton) 308.)

OVERTON, J. . . . The great and important principles of the court of chancery, so necessary to the preservation of law in a free country, were unknown in the time of Coke. The exercise of its necessary powers met with his decided and strenuous opposition. And it will always be kept in mind that the jurisdiction of chancery was then in its infancy. Its superiority to courts of law, in adapting its modes of redress in civil cases, to the varied actions of man was then unknown; nor in fact had any efforts been made to ascertain the limits of its jurisdiction, narrow as it was. We have not a vestige of a decision in chancery previous to the time of Charles II.

It was the court of common law that anciently did all the business and it was in advancement of the jurisdiction and improvement of those courts, that we find the sturdy and capacious mind of Coke employed. Most of his reported cases, and references to other reports respected cases decided at law.

In his time, and particularly with his disposition, if a man could not obtain remedy at law, he must generally go without it. Though there was not wanting a disposition to make the modes of redress at common law, adequate to the exigencies of society; yet so confined were those courts in their method of proceeding, as to be incapable of administering substantial justice in many cases; this generated a disposition in the nation to enlarge the chancery powers, to administer justice where the modes of redress at law were incompetent to afford it. As commerce extended, and civilization progressed, the necessity and convenience of the exercise of chancery powers increased; until

¹ The statement of facts has usually been omitted. Where parts of the opinion have been omitted, such omission has been indicated thus: . . .

we see at this day, a court of equity, exercising undisputed jurisdiction, not only as an auxiliary in the cause of justice, agreeably to its original character; but exercising concurrent jurisdiction with courts of law, in relation to many of its important branches, when the modes of legal redress have been found to be embarrassed, doubtful, or inadequate. . . .

The principles which govern the rights of men are exactly the same in courts of law, and courts of equity. The history of our jurisprudence shows that the latter has ever acted as pilots for courts of law, in the improvement of legal science. Sir John Mitford observes, that "the distinction between strict law and equity is never in any country a permanent distinction. It varies according to the state of property, the improvement of arts, the experience of judges, the refinement of a people," and again, that "law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law, was formerly considered as equity; and the equitable decisions of this age will unavoidably be marked under the strict law of the next." Mitf. 428, 431. In this short outline, we see the boundaries between law and equity, described by the pen of a master in his profession. The precedents result in this, that wherever a party can obtain adequate relief in a court of law, according to its modes of proceeding, he shall not have relief in equity. But where the remedy is difficult, embarrassed, or inadequate, equity will entertain jurisdiction. 3 Johns. 590, 2 Cains 251, Hughes Rep. 79, 10 Johns. 587.

But it is of great importance, that the jurisdiction of courts of law and equity, should be kept as distinct as possible. Thus, Sir John Mitford, afterwards, when chancellor of Ireland, observes, in the case of Shannon and Bradstreet, when speaking of the constitution of courts of justice, "It is a most important part of that constitution, that the jurisdiction of the courts of law and equity, should be kept perfectly distinct; nothing contributes more to the due administration of justice. And though they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different. And anybody who sees what passes in the courts of justice in Scotland, will not lament that this distinction prevails. But Lord Mansfield seems to have considered that it manifested liberality of sentiment, to endeavor to give the courts of law the powers which are vested in courts of equity; that it was the duty of a good judge

ampliare jurisdictionem. This, I think, is rather a narrow view of the subject. It is looking at particular cases, rather than at the general principles of administering justice, observing small inconveniences, and overlooking great ones." 1 Sch. and Lefroy 66.

POTTER v. WHITTEN.

(Missouri Court of Appeals, 1911, 161 Mo. App. 118, 142 S. W. 453.)

NIXON, P. J. . . . In the case at bar, in the original action the defendant was personally served with process and personally appeared and filed an answer, thus conferring on the court jurisdiction over his person. There is no contention that the circuit court of Jasper county did not have jurisdiction over the class of actions to which this action belongs, and we hold that said circuit court did have jurisdiction of the subject matter of action, whether the action be considered as an action at law, on the promissory note as contended by appellant, or as a suit in equity for the foreclosure of the lien of a pledge as contended by respondent.

Under our code of procedure we have but one form of action for the enforcement or protection of private rights which is called a civil action. We submit all causes to the judgment of one court; and, in order to enable it to fulfill its functions, the law has clothed the judge thereof not only with the attributes of a law judge, but also with those of a chancellor (State ex rel. v. Evans, 176 Mo. 1. c. 317, 75 S. W. 914). Both legal and equitable causes of action may be joined in the same petition if connected with the same transaction. (Blair v. Railroad, 89 Mo. 383, 1 S. W. 350; Woodsworth v. Tanner, 94 Mo. 124, 7 S. W. 104.) The fact that a statutory remedy has been provided does not exclude the original equitable remedy; so that under the decisions of this state ample play is given to the powers of a court of equity, and when it has once acquired jurisdiction for one purpose the general principle is enforced that it will retain jurisdiction for all purposes and do complete justice and not put the parties to the trouble of an action at law. . . .

The wisdom of the law should no longer require a litigant to be driven from one court to another, nor be compelled to have two causes of action and two trials instead of one when the whole matter can be disposed of in one action. . . .

WARFIELD HOWELL CO. v. WILLIAMSON.

(Supreme Court of Illinois, 1908, 233 Ill. 487, 84 N. E. 706.)

VICKERS, J. . . . Plaintiffs in error seek to maintain the proposition that since the relation of the parties, as well as the relief sought, is purely legal, equity has no jurisdiction. Defendant in error seeks to uphold the jurisdiction of equity, on the ground that the case falls within the exclusive jurisdiction of a court of equity. Neither of these contentions is sound. In our opinion the case belongs to that class where both the primary rights and the relief sought are purely legal and therefore cognizable in a court of law, but of which a court of equity will take jurisdiction on the ground that, owing to the methods of procedure and the means available to carry its decrees into execution, its remedies are more adequate, complete and prompt than those afforded by a court of law. Defendant in error in the case at bar is the holder of six policies of insurance on which it claims a liability against plaintiffs in error on account of the loss of its goods by fire. There is nothing in the character of the rights or in the ultimate relief sought that distinguishes this case from any other claim under an insurance policy for loss. It would be a very unusual state of facts if one holding a fire insurance policy could not maintain an action at law thereon to recover for a loss. We see no reason for holding that the policies involved in this suit might not be sued on in a court of law. It does not follow, however, that because the case is one in which a remedy at law is afforded, equity will not also take jurisdiction of the same state of facts to afford the same redress. If the remedy in equity is more adequate because of some special circumstance of the situation, the jurisdiction of equity will be sustained. In the case at bar the ultimate relief sought is the satisfaction of a legal demand, but this demand is to be paid out of a particular fund created or to be created by contributions made by a large number of persons, which is either in the hands of the manager or is to be collected by him from the subscribers. It may become necessary, before the decree is satisfied, to require the manager to perform some or all of the personal duties which he has assumed in respect to the collection and disbursement of the funds of the indemnity company. If so, the procedure in courts of equity is peculiarly well adapted to enforce the performance of any personal act required of plaintiffs

in error in order to obtain satisfaction of the decree. One of the oldest maxims of equity is that it acts *in personam*—not *in rem*. A decree in chancery speaks in words of command to the defendant, but to carry it into effect some personal act of the defendant is required. For instance, equity determines that one party is the owner of the equitable title to land and decrees that a conveyance shall be made by the holder of the legal title thereof. Such a decree does not, *ex proprio vigore*, vest the title. The personal act of the defendant, or some one for him, in making the conveyance is necessary to carry the decree into effect. (1 Pom. sec. 428, *et seq.*) A court of equity has all the powers of a law court to enforce its decrees by an execution against the property of the defendant. In addition to the usual process of execution against the goods, chattels, lands and tenements of the defendant, a court of equity may, if necessary, attach the defendant and enforce a compliance with its decree by fine or imprisonment,—one of both,—or may direct a sequestration for disobedience to its decree. (Hurd's Stat. 1905, chap. 22, sec. 47.) By the flexibility of its procedure and the score of remedies it is authorized to employ to secure satisfaction of its decrees, courts of equity are peculiarly well equipped to furnish complete and adequate relief in cases of this character. There is a legal obligation at the foundation of the suit, but difficulties may arise out of the manner in which the obligation rests upon the persons or property of plaintiffs in error or in the efficiency of the process belonging to the law court which makes the legal remedy inadequate. (Wylie v. Coxe, 15 How. 416; Barber v. Barber, 21 Id. 582.) In Weymouth v. Boyer, 1 Ves. Jr. 416, Mr. Justice Buller says: "We have the authority of Lord Hardwicke that if a case was doubtful or the remedy at law difficult we would not pronounce against the equity jurisdiction. This same principle has been laid down by Lord Bathurst." (See Society of Shakers v. Watson, 68 Fed. Rep 630.) We have no doubt of the jurisdiction of a court of equity under the facts disclosed here. . . .

CAMPBELL v. GILMAN.

(Supreme Court of Illinois, 1861, 26 Ill. 210.)

This was an action of assumpsit, brought by the indorser of a promissory note against the makers.

Declaration in the usual form, with special and common counts.

Plea: That since the commencement of the suit, in a certain cause in said court, in which William Engles, Michael Engles, John Engles, and Joseph Engles by William Engles, his next friend, were complainants, and Peter Engles, Catherine Goetell, Peter Goetell, said defendants, Orris H. Bullen and George C. Campbell, and also Joseph O. Glover, were defendants, the said Campbell and Bullen were enjoined from paying said note until the further order of said court, and that said order was in full force and effect.

Demurrer to plea, general and special. . . .

BREESE, J. . . . The demurrer was properly sustained to the plea in this case. No case can be found in the books, where a temporary injunction, like that set out in the plea, was ever held to be a bar to the recovery of a judgment in an action upon a note. It acts only upon the defendant's name in the writ, and would operate to prevent payment, but not on the action of the court to render a judgment. By proceeding, the plaintiff might, possibly, subject himself to a contempt, but the court might proceed with the cause. If such an injunction could be pleaded in bar, it would amount to a complete satisfaction of the debt, as much so as actual payment.

The appellants were called upon to produce authority for such a plea, but none is shown. . . .

EATON v. McCALL.

(Supreme Court of Maine, 1894, 86 Maine, 346, 29 Atl. 1103.)

WISWELL, J. Bill in equity between parties resident in this State to foreclose a mortgage upon real estate situated in Nova Scotia.

The defendant failing to appear, the bill was taken *pro confesso*. Afterwards on motion for a decree, the justice presiding at *nisi prius*, being doubtful as to the jurisdiction of this court, with the consent of counsel for the complainant reported the case to the law court to determine whether the bill should be sustained, and what decree if any, should be made.

It is a familiar maxim of equity jurisprudence, that equity acts against the person. Where the subject-matter is situated within another State or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which

directly affects and operates upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly*, affected by the relief granted. Pomeroy's Equity Jurisprudence, § 1318.

Common instances of such an exercise of equity powers, are where courts, having jurisdiction of the person, decree the specific performance of contracts to convey lands, enforce and regulate trusts, or relief from fraud, actual or constructive, although the subject matter of the contract, trust or fraud, either real or personal property be situated in another State or country. A leading case upon this subject and one often cited in modern cases, is that of Penn v. Lord Baltimore, 1 Ves. 444, decided in 1750 by Lord Chancellor Hardwicke.

The fact of the *situs* of the land being without the commonwealth does not exempt defendant from jurisdiction, the subject of the suit, being the contract, and a court of equity dealing with persons, and compelling them to execute its decrees and transfer property within their control, whatever may be the *situs*. Pingree v. Coffin, 12 Gray, 288.

The principle is thus stated by the Federal Supreme Court: "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts do consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by a process *in personam*." Phelps v. McDonald, 99 U. S. 298.

Our court in Reed v. Reed, 75 Maine, 264, sustained a bill and made the necessary decrees to redeem from a mortgage lands situated in the state of Wisconsin. And the court has in many cases proceeded and granted relief upon the maxim, *equitas agit in personam*.

The English chancery courts, regarding the right to redeem as a mere personal right, and the decree for a foreclosure, a decree *in personam*, have often decreed the foreclosure of mortgages upon lands beyond the jurisdiction of the court. Toller v. Carteret, 2 Vern. 495; Paget v. Ede, L. R. 18 Eq. 118.

In this country the question has frequently arisen as to the power of an equity court to decree the foreclosure of a mortgage upon property situated both within and without the jurisdiction of the court. The doctrine is sustained by the highest authorities that a court having jurisdiction of the person of the mortgagor, or of the owner of the right to redeem, may decree such a foreclosure.

In *Muller v. Dows*, 4 Otto, 444, it was held that a U. S. Circuit Court for the District of Iowa, which had jurisdiction of the mortgagor and the trustees of the mortgage, could make a decree foreclosing a mortgage upon a railroad and its franchises and order a sale of the entire property although a portion of the property was in the State of Missouri. Mr. Justice Strong in delivering the opinion of the court said, "Without reference to the English Chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person may decree a conveyance by him of land in another State, and it may enforce the decree by a process against the defendant.

In *Union Trust Co. v. Olmstead*, 102 N. Y. 729, the plaintiff sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation upon property, a part of which was situated in another State. The court held that although the decree of foreclosure might not be operative beyond the territorial limits of the jurisdiction, that the court might have required the mortgagor, being within the jurisdiction, to execute a conveyance of the property situated in the other State.

To the same effect are numerous other decisions by courts of the highest authority in this country, both Federal and State. After an examination of these authorities we have no doubt that this court has the power to make a decree compelling a mortgagor, over whom it has jurisdiction, to make a conveyance of the mortgaged premises, after failure to pay the amount ascertained to be due, within the time fixed by a decree of the court, which time should not be less than the statutory period allowed for redemption in the place where the land is situated.

But as to when and under what circumstances this power should be exercised by the court, is, we think, another and quite different question. It must be remembered that no decree of the court would be operative except one against the mortgagor, or person having the right to redeem, commanding a conveyance. The court could not proceed in the usual and customary method by decreeing either a strict foreclosure or a foreclosure by a judicial sale. Neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. *Watkins v. Holman*, 16 Pet. 25. A court cannot send its process into another State nor can it deliver possession of land in another jurisdiction. *Muller v. Dows*, *supra*: It can only accomplish foreclosure of such a mortgage by its decree *in personam*, compelling a conveyance.

We do not think that a chancery court should exercise this power except under unusual or extraordinary circumstances. Wherever it is necessary in order to prevent loss or to protect the rights of a mortgagee it may be done, for instance in the case of a mortgage upon property situated both within and without the State, where unless a sale of the entire property could be made at one time, great loss might ensue, or in other cases where an equally good reason existed. But ordinarily we think that the holder of a mortgage should be required to resort to the remedies or the courts of the jurisdiction in which the land is situated. This is in accordance with the principle, than which none is better established that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the same is situated. *Watkins v. Holman*, *supra*.

In this case there are no reasons, either alleged or apparent why the holder of the mortgage cannot foreclose the same according to the law of the place where the land is situated, without loss or great inconvenience.

We think therefore that the entry should be,
Bill dismissed without prejudice.

CLOYD v. TROTTER.

(Supreme Court of Illinois, 1887, 118 Ill. 391.)

Scott, C. J. The bill in this case was brought in the circuit court of Wayne county, by William Trotter, against James C. Cloyd, and

was to remove a cloud from the title to property which complainant claimed to own. A decree was rendered in accordance with the prayer of the bill, and as the title to the property is involved, defendant brings the case directly to this court on error, as he is authorized by law to do.

No question is raised on the bill, and the assignment of errors does not make any discussion of the merits of the case necessary. Defendant is a non-resident of the State of Illinois, and the service upon him was by a service of a copy of the bill upon him, at his residence in the city of New York. It is objected, the service was insufficient, and as there was no appearance by defendant, or by any solicitor for him, the court had no jurisdiction to render the decree it did. Section 14 of the Chancery Act (Rev. Stat. 1874, p. 200) provides: "The complainant may cause a copy of the bill, together with a notice of the commencement of the suit, to be delivered to any defendant residing or being without this State, not less than thirty days previous to the commencement of the term at which such defendant is required to appear, which service, when proved to the satisfaction of the court, shall be as effectual as if such service had been made in the usual form within the limits of this State."

The point is made against the sufficiency of the service in this case, that the notice of the commencement of the suit was not signed, either by complainant, or any solicitor for him. The Statute does not, in terms, require the notice to be served shall be signed either by complainant or his solicitor, but the better practice, no doubt, is, that it should be signed. In this case the notice was attached to the bill, and may be treated as a part of it, and as the bill was signed by the solicitor of complainant, that is thought to be sufficient, and especially when considered in connection with the affidavit of the party making the service, wherein it is alleged he "served a copy of the within bill and notice of the commencement of the suit, upon" defendant. In this respect the notice is sufficient.

It is further objected, no summons was issued for defendant, and no effort made to obtain personal service upon him. Here, again, the statute is silent. It is not provided summons shall be issued and returned not found, before a defendant residing or being without the limits of this State may be served with a copy of the bill filed against him, and of a notice of the commencement of the suit. But if the statute did require the issuing and return of a summons, it is thought this record does show a summons was issued, and returned not found,

as to defendant, before the copy of the bill was served upon him. The question of jurisdiction is always a preliminary one, and the court, in this case, found, by its decree, it appeared "to the court a summons had been issued against defendant and returned not found." There is nothing in the record itself that contradicts this finding of the court, and it must therefore be regarded as having been correctly found. No summons is found in the record for defendant. The clerk recited that the only summons found among the papers of the case, is one for J. B. Cornell, at the suit of William Trotter. Cornell is not a party to this suit in any way. There is nothing whatever to show the summons transcribed into the record was issued in this case, or that it was before the court when it found, as it did, that "a summons had been issued against defendant, and returned not found." It may be that a summons for defendant was issued, and lost from the files. How that may be, of course does not appear, but it is certain there is nothing to show the court found incorrectly on this jurisdictional question.

The third error of the series, viz., the court erred in entering a personal judgment against defendant for costs, and in awarding execution against him for the collection of the same, seems to be well assigned. There was no appearance in the court below, either by defendant, or any solicitor for him, and it is not perceived how that court obtained jurisdiction of his person so as to render a personal decree against him, for costs or otherwise, and to award execution against him, as for the collection of a personal money decree. So far as the property situated within the jurisdiction of the court is involved, the court had jurisdiction to decree concerning it, and defendant, and all parties claiming through or under him, would be bound. But that fact gave no jurisdiction to the court to render a personal money decree against him, as the court might do if defendant had been within its jurisdiction. It affirmatively appears in this case, defendant resided in another State. Treating the service by copy of the bill, and notice of the commencement of the suit, as effectual "as if such service had been made in the usual form within the limits of this State," as the Statute provides shall be done, still such service does not confer jurisdiction on the court, of the person of defendant, so as to enable it to render a personal money decree against him, to be collected by execution. No one will insist the court could send its process out of the State, and by proof of service within a foreign State acquire juris-

diction over the person of defendant, so as to render a personal money decree against him. It is so obvious it need not be stated, that persons residing or being without the limits of this State can not be subjected to the jurisdiction of the local courts by the service of process or other service upon them at the place of their domicile.

The decree of the circuit court, so far as it adjudged costs against defendant, and awarded execution for the collection of the same, will be reversed in this court, but in all other respects it will be affirmed; and as he ought, on account of the wrongful conduct alleged against him in the bill, to pay such costs, plaintiff in error will be required to pay all costs in this case in this court.

Decree reversed in part and in part affirmed.

GREAT FALLS MANUFACTURING COMPANY v. WORSTER.

(Supreme Court of New Hampshire, 1851, 23 N. H. 462.)

In Equity. The following case was stated in the bill:

The orators are a corporation established at Great Falls, on Salmon river, in Somersworth, and own five cotton mills there, with suitable machinery, and to enable them to use the mills, they need the water of Salmon river. For this purpose, they have kept up a dam for some years past, across the river, at the outlet of the Three Ponds, so called, partly in Milton, in this county, and partly in Lebanon in the State of Maine, and have thereby accumulated the water in rainy seasons, and have used it in seasons of drought. The respondent, who is a citizen of New Hampshire, claims an interest in certain tracts of land, some of which are in Milton, and some are in Lebanon, and which are flowed by the water of the pond created by the dam, his rights to which lands are denied by the orators. The respondent has recently destroyed a part of the dam, and threatens to remove the whole of it, so that it shall be no higher than, as he alleges, it ought to be, and so that it shall not cause the water to flow the lands in which he professes to have an interest. The bill prays, that he may be enjoined from destroying any part of the abutment, dam, or superstructure, and from intermeddling with it in any way.

The bill contained other allegations, which are at present immaterial, the only question now raised, being, whether the court had jurisdiction

to restrain a citizen of this State, from going into another State, and committing acts injurious to the property of the orators situated here. . . .

GILCHRIST, C. J. The application now before us is made by virtue of the provision contained in No. 7, ch. 171, Rev. Stat., which authorizes the court to "grant writs of injunction whenever the same shall be necessary to prevent injustice." Questions analogous to that now presented have often been investigated, both in England and in this country, and the principles recognized by the decisions, go far enough to authorize the court to grant the relief now prayed for. The court are not asked to assume any jurisdiction, or exercise any control over the land in Maine, or to interfere with the laws of that State. Nothing more is asked than that the respondent, a citizen of New Hampshire, and residing within her limits, shall be subject to her laws, and that, being within reach of the process of this court, he shall be forbidden to go elsewhere and commit an injury to the property of other citizens, situated here, and entitled to the protection of our laws.

In the case of *Penn v. Lord Baltimore*, 1 Ves., 444, Lord Hardwicke recognized and acted upon the principle that equity, as it acts primarily *in personam*, and not merely *in rem*, may make a decree, where the person against whom relief is sought, is within the jurisdiction upon the ground of a contract, or any equity subsisting between the parties respecting property situated out of the jurisdiction. A decree was made for the specific performance of a contract relating to the boundary between the colonies of Pennsylvania, and Maryland. In the course of his judgment, Lord Hardwicke says: "this court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries, and their bill does not stand in need of that. It is founded on articles executed in England, under seal, for mutual considerations, which gives jurisdiction to the king's courts, both in law and in equity, whatever be the subject-matter." He subsequently says: "the conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement."

This case decided, that although the subject-matter of a contract be land out of the jurisdiction, the boundary of the land may be settled by a decree for a specific performance of the contract. In this way a party within the jurisdiction may be compelled to do an act of justice,

in relation to land out of the jurisdiction. The case is a leading one, and its principle has been extensively followed. This doctrine, however, was not first suggested by Lord Hardwicke. Before his time, it was well established in the court of chancery, although it had not received so elaborate an exposition in any preceding case, as in the decision referred to. In the case of *Arglasse v. Muschamp*, 1 Vernon, 75, the bill prayed for relief against an annuity charged upon the orator's lands in Ireland, on the ground of fraud. The respondent pleaded to the jurisdiction of the court, that, the lands lying in Ireland, the matter was properly examinable there, and that the court ought not to interpose. The Lord Chancellor said: "this is surely a jest put upon the jurisdiction of this court, by the common lawyers; for when you go about to bind the lands, and grant a sequestration, to execute a decree, then they readily tell you, that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam*, only; and when, as in this case you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local; and so would wholly elude the jurisdiction of this court." The plea was overruled. In the case of *Toller v. Carteret*, 2 Vernon, 494, the bill was to foreclose a mortgage upon the island of Sarke, and the respondent pleaded to the jurisdiction of the court, that the island of Sarke was part of the Duchy of Normandy, and had laws of its own, and was under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the court of chancery. But it was held, "that the court of chancery had also a jurisdiction, the defendant being served with the process here, *et aequitas agit in personam*, which, is another answer to the objection." In *Lord Cranstown v. Johnson*, 3 Ves., 170, the master of the rolls, after commenting on some of the cases, says: "these cases clearly show, that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country particularly in the British dominions, this court will hold the same jurisdiction, as if they were situated in England." In *Portarlington v. Soulby*, 3M & R. 104, the bill was to restrain the respondents from suing in Ireland, upon a bill of exchange given for a gambling debt. Upon a motion to dissolve the injunction Lord Brougham said: "In truth nothing can be more unfounded, than the doubts of the jurisdiction. That is grounded, like all

other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made, being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if for instance as in *Penn v. Lord Baltimore*, it can decree the performance of an agreement touching the boundary of a province in North America; or as in the case of *Toller v. Carteret*, can foreclose a mortgage, in the isle of Sarke, one of the channel islands, in precisely the like manner can it restrain the party, being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance, or other act *in pais*, of the instituting or prosecution of an action in a foreign court."

The principle that a court in chancery will exercise such a power as the orators ask should now be enforced, whenever the case is one of equitable cognizance, and the parties are within the jurisdiction, although the property may be beyond it, is as fully recognized by the courts in this country, as in England. In *Massie v. Watts*, 6 Cranch, 148, the question was whether the defendant, being within the jurisdiction of the circuit court in Kentucky, could be decreed to convey lands in Ohio, and the defence was that the land lay beyond the jurisdiction of the court. Marshall, C. J., said, "where the defendant is liable, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced upon the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. . . .

In the case of *Sutphen v. Fowler*, 9 Paige, the bill was filed for the specific performance of a contract for the sale of lands in Michigan, against the infant child of the contracting party, who at the time of his death was entitled to a conveyance of the legal title to the premises, which was subsequently made to the defendant. It was held, that the court had jurisdiction to decree the specific performance of a contract for the sale of lands in another State, where the person of the defendant was within reach of its process, and might direct a conveyance by the infant when she should arrive at the proper age

to enable her to transfer the legal title according to the laws of Michigan and might authorize the orator to take and to retain possession of the premises until that time, if he could obtain possession of them without suit. It was also held, and that is very pertinent to the present inquiry, that in the meantime, the court might grant a perpetual injunction, restraining the defendant from disturbing the complainant in such possession, or from doing any act whereby the title should be transferred to any other person, or in any way impaired or incumbered.

This decision is in point not only as regards the principle, but also in relation to its application to a state of facts similar to those in the case now before us. Nothing more is asked by the orators here, than that the defendant should be restrained from injuring or interfering with the property of the orators situated in Maine, and the above case of *Sutphen v. Fowler* is an express adjudication that he may be so enjoined. The principle is also recognized and stated, by the most eminent elementary writers. *Jeremy's Eq. Jur.*, 557; *Story's Eq. Jur.*, 743, 744, 899, 900.

It would be a great defect in the administration of the law, if the mere fact, that the property was out of the State could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this State, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding, that the court has jurisdiction to issue the injunction prayed for.

ROYAL LEAGUE v. KAVANAGH.

(Supreme Court of Illinois, 1908, 233 Ill. 175, 84 N. E. 178.)

DUNN, J. The appellant filed its bill in the circuit court of Cook county for an injunction to restrain the appellee from bringing an action in the State of Missouri against the appellant upon a benefit

certificate issued by it to Thomas W. Kavanagh, in which the appellee was named as beneficiary. The circuit court sustained a demurrer to the bill, which was thereupon dismissed for want of equity, and that decree having been affirmed by the Appellate Court, this further appeal is prosecuted by the appellant. . . .

The bill further alleged that the appellee, in order to evade the law of Illinois by which her rights should be determined and in order to avail herself of the law of Missouri, now threatens to bring legal proceedings in Missouri on the benefit certificate to compel the appellant to pay the sum of \$4,000 whereas in truth and in fact it is liable for no more than \$322.84, which action and conduct on the part of the appellee, unless restrained, will be a fraud upon the appellant and will result in depriving it of its rights under the laws of this State. . . .

There is no question as to the right to restrain a person over whom the court has jurisdiction from bringing a suit in a foreign State. (*Harris v. Pullman*, 84 Ill. 20). The courts do not, in such cases, pretend to direct or control the foreign court, but the decree acts solely upon the party. The jurisdiction rests upon the authority vested in courts of equity over persons, within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience. The State has power to compel its own citizens to respect its laws even beyond its own territorial limits, and the power of the courts is undoubted to restrain one citizen from prosecuting in the courts of a foreign State an action against another which will result in a fraud or gross wrong or oppression. (*Snook v. Snetzer*, 25 Ohio St. 516; *Keyser v. Rice*, 47 Md. 203; *Teager v. Landsley*, 69 Iowa, 725; *Wilson v. Joseph*, 107 Ind. 490; *Dehon v. Foster*, 4 Allen, 545). But the court will not restrain the prosecution of a suit in a foreign jurisdiction unless a clear equity is presented requiring the interposition of the court to prevent a manifest wrong and injustice. It is not enough that there may be reason to anticipate a difference of opinion between the two courts, and that the courts of the foreign State would arrive at a judgment different from the decisions of the courts in the State of the residence of the parties. (*Carson v. Durham* 149 Mass. 52). It is not inequitable for a party to prosecute a legal demand against another in any forum that will take legal jurisdiction of the case, merely because that forum will afford him a better remedy

than that of his domicile. To justify equitable interposition it must be made to appear that an equitable right will otherwise be denied the party seeking relief. *Thorndike v. Thorndike*, 142 Ill. 450.

A person has the right to select such tribunal having jurisdiction as he chooses for the prosecution of his rights, and the court which first obtains jurisdiction will retain it. Such jurisdiction cannot be defeated because the defendant may prefer another tribunal in which he supposes the decision will be more favorable to him. In this case it is not averred that the Supreme Court of Missouri has laid down any rule of law different from that of this court. The averment is, that in two cases mentioned the Court of Appeals of Missouri has settled the rule of law in that State in accordance with the statement thereof in the bill. It is not averred that the Court of Appeals of Missouri is the court of final appellate jurisdiction in the State, or that the court of final appellate jurisdiction has made any decision of any question involved in this case. While the law of another State is matter of fact of which we cannot take judicial notice, yet the allegations of the bill in that regard are entirely consistent with the hypothesis that the Court of Appeals, whose decisions are alleged to have established the law of Missouri, may be an inferior court of that State of limited territorial jurisdiction, whose decisions are subject to review by the Supreme Court. This court cannot, in advance of its announcement by the Supreme Court of Missouri, assume that the common law in that State will be declared to be different from the common law as construed in this State. Allegation and proof that a court of a State not having final appellate jurisdiction has settled a particular rule of law does not constitute allegation or proof that such rule is the law of the State. So far as appears, if the appellee should bring an action in the State of Missouri against appellant on this benefit certificate, and if the *nisi prius* and Appellate Courts should decide against appellant, it would be entitled to have such decision reviewed by the Supreme Court of the State of Missouri, and we have no reason to suppose that that court will not do justice between the parties and give effect to the rules of law applicable to the case.

The judgment of the Appellate Court will be affirmed.

SNOOK et al. v. SNETZER.

(Supreme Court of Ohio, 1874, 25 Ohio St. 516.)

REx, J. The assignments of error and the arguments in the case present two questions for the determination of this court.

The first question relates to the exemption laws of this state, and makes the point, whether, by the laws in force when the debt in question was contracted, June 2, 1866, the earnings of the debtor for his personal services within the three months next preceding when necessary for the use and support of his family, were exempt from being applied to the payment of his debts. The policy of this state, as exhibited by its legislation for more than a quarter of a century, had been to protect the family of a debtor, in some measure, from the consequences of debts contracted by its head. . . . Construing the provisions of the code in accordance with well-established rules on that subject, we have no doubt that by these provisions it was intended to exempt, as well in attachment as under the proceedings in aid of execution, the earnings of the debtor for his personal services for the time prescribed, where the same were necessary for the purpose named.

The remaining question to be determined is: Have the courts of this state authority, upon the petition of a resident who is the head of a family, by injunction, to restrain a citizen of the county in which the action is commenced from proceeding in another state to attach the earnings of such head of a family with a view to evade the exemption laws of this state, and to prevent such head of a family from availing himself of the benefit of such laws?

The authority of the courts in such a case to restrain a citizen from thus proceeding for the purpose named, is, in our opinion, clear and indisputable.

In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and is in the power of the court issuing it. The order operates upon the person of the party, and directs him to proceed no further in the action, and not upon the court of the foreign state or country in which the action is pending. On this subject, Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, section 899, says: "Although the courts of one country

have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit." In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of dispute, they consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees *in personam*.

THE PORT ROYAL RAILROAD COMPANY v. HAMMOND.

(Supreme Court of Georgia, 1877, 58 Ga. 523.)

WARNER, C. J. The defendant is a Georgia corporation, created by an act of the general assembly of this state, and its powers and duties are to be exercised and performed within the territorial limits of the state. As an artificial person, it has no extra-territorial existence—14 Ga. Rep., 328. The object and prayer of the complainant's bill is, that the defendant may be decreed to specifically execute the contract, alleged to have been made with the defendant, for the right of way for its railroad through the lands of the complainant, situated and being in the state of South Carolina, and to recover damages for the injury already sustained from the non-performance of that contract. The complainant's equity is based upon his alleged right to have the defendant compelled, by a decree of the court of this state, to specifically perform the alleged contract in the state of South Carolina, by keeping the ditches open upon the complainant's land, situated in that state, to the depth of five feet, and to construct, and keep in proper repair, sufficient cattle-guards or stock-gaps, upon the complainant's land, in the state of South Carolina. There is no doubt that when a court of equity has jurisdiction of the person of a defendant, it may decree the specific performance of a contract for the conveyance of land situated in a foreign state or country, and also restrain a defendant by injunction in certain specified cases, by acting

upon the *person* of the defendant within its jurisdiction; and that is the principle which the complainant insists should be applied to the defendant in this case. Although a court of equity will act upon the person of a defendant within its jurisdiction, and compel the specific execution of a contract in relation to lands in a foreign state, on a proper case being made, still, we are not aware that the court has ever gone to the extent of compelling a defendant by its decree, to go into a foreign state and specifically execute a contract *there*, even in the case of a natural person; and, more especially, when the defendant is an artificial person, having no legal existence beyond the territorial limits of the state which created it.

The court of equity of Richmond county, in this state, had no jurisdiction to compel the defendant, by its decree, to go into the state of South Carolina and specifically execute the alleged contract, as set forth in complainant's bill, by opening the ditches on complainant's land there, and keeping the same open to the depth of five feet, and by constructing and keeping in repair proper and sufficient cattle-guards, or stock-gaps thereon, and, upon its failure to do so, to enforce that decree by an attachment and sequestration of its property in this state.

If the acts required to be done on the part of the defendant, by the decree of the court, in the specific execution of the contract in question, were required to be performed in this state, there would not seem to be any well-founded objection to the jurisdiction of the court, notwithstanding the land, the subject matter of the contract, is situated in the state of South Carolina. This, however, is as far as the principle contended for has been recognized. See Wharton on Conflict of Laws, sections 288, 289, 290. But the specific execution of the contract, as prayed for in complainant's bill, can only be performed by going on the land in South Carolina and cutting ditches upon it there to the depth to five feet, and keeping them open so as to effect the stipulated drainage of the land, and by constructing and keeping in repair proper and sufficient stock-gaps thereon. To hold that the court has jurisdiction to grant the specific relief prayed for against the defendant, would be to decide that a corporation, an artificial person, having no legal existence beyond the territorial limits of the state which created it, can be compelled to go into another state in which it has no legal existence, and there to cut and keep open ditches, construct and keep in repair

stock-gaps on the complainant's land in that state, and, upon its failure to do so, that its property, in this state, may be attached and sequestered to compel the performance of such specific acts by the defendant in a state and country where it has no legal existence to perform the same. . . . It would, therefore, seem to be much more equitable and just that the complainant should seek a specific execution of the alleged contract against the corporation with which it was made, and in the courts of the state in which the land is situated, and obtain his decree in accordance with the laws of that state, and where the court will have no jurisdiction to enforce it in conformity therewith. The specific execution of contracts by a court of equity must always rest in the sound discretion of the court. To compel the Georgia corporation, by a decree of the court, to specifically perform the alleged contract, made by the complainant with the South Carolina corporation, and to enforce its performance in the latter state by an attachment and sequestration of its property situated in Georgia, would be unfair, unjust, and against good conscience, inasmuch as its property in this state may not be more than sufficient to discharge its own contracts and liabilities to its creditors here.

In our judgment the court erred in overruling the defendant's demurrer to the complainant's bill.

Let the judgment of the court below be reversed.

BABCOCK v. McCAMANT.

(Supreme Court of Illinois, 1870, 53 Ill. 215.)

WALKER, J. . . . It has long been the practice, in equity, to enjoin the collection of a judgment that has been paid, satisfied, or it has otherwise become inequitable to enforce; and our statute has recognized the right to enjoin judgments. But it is urged that the remedy was complete under the statute, by applying to the circuit judge at chambers, to order a stay of proceedings under the execution, until a motion to quash the execution and levy could be heard at the next term. This may be true of the execution, and a levy, but it is not clear that the circuit court could correct the judgment on a motion. But even if it could, it is more satisfactory and complete to grant the relief in equity. The facts alleged and admitted by the demurrer, show

gross fraud, and fraud is a matter of equity jurisdiction, and that court did not lose it by the statute conferring similar jurisdiction upon the courts of law. If, then, under the statute, or the inherent power of a court of law to control its process and records, that court could correct the judgment, still it would not deprive equity of jurisdiction. . . .

RHOTEN v. BAKER.

(Appellate Court of Illinois, 1902, 104 Ill. App. 653.)

WRIGHT, P. J. This was a bill in equity filed by the plaintiff in error against the defendants in error to require the latter to accept the damages and pay the benefits assessed by a jury for the laying out and opening of a road for private and public use, under the provisions of section 54 of the act in regard to roads and bridges under township organization, and to prevent the defendants from combining and confederating together to defeat the opening of such road. The court sustained a demurrer to the bill and dismissed it for want of equity, and to reverse the decree this writ of error is prosecuted. . . . In these conditions plaintiff claims no adequate remedy exists at law, and that he is without such remedy save in a court of equity.

It is, however, insisted by the defendants that inasmuch as the statute gives to the verdict of the jury in such cases the force and effect of a judgment, which it does, that plaintiff's remedy is at law; desiring it to be inferred, we presume, that an execution might be issued upon the judgment for the damages assessed. . . . Plaintiff, therefore, by the facts stated in his bill, admitted by the demurrer, had a right to the road in question, and by the same facts defendants wrongfully obstructed such rights in such manner as the law could afford no adequate remedy for the wrong done by the defendants. If we are right in this conclusion, and we feel sure of that, then no authority need be cited to prove that a bill in equity is the appropriate remedy; for when a right is given to a person, then wrongfully taken away by another, and the law by reason of its universality can not afford a remedy in the peculiar circumstances of the case, equity will correct the law and furnish the remedy. . . .

Reversed and remanded.

TOLEDO, A. A. & N. M. RY. CO. v. PENNSYLVANIA CO. et al.

(U. S. Circuit Court, 1893, 54 Federal Reporter 746.)

RICKS, J. . . . It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: "I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." Mr. Justice Blatchford, speaking for the supreme court in *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, said: ". . . It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation."

MORRIS v. PARRY.

(Missouri Court of Appeals, 1904, 110 Mo. App. 675, 85 S. W. 620.)

JOHNSON, J. . . . The relief granted by the court under this strange petition is contained in the following portion of the decree, "that the testimony of John H. Winkle incorporated in the disposition of said John H. Winkle on file in the office of the clerk of the circuit court of Barton county in the case of R. E. Smith against Joseph C. Parry and Nancy C. Parry, defendants, be and the same is hereby established and perpetuated as and for the testimony of the said John H. Winkle for the purpose of establishing the existence of said deed of

said Joseph C. Parry and Josephine Parry to Barton county . . . and in all suits by Nancy C. Parry having for the purpose the establishment of a right of dower in her as the widow of Joseph C. Parry in and to said real estate against all persons whomsoever the same is hereby decreed to be competent testimony." A certified copy of the decree was ordered to be filed and recorded in the office of the recorder of deeds.

This proceeding does not fall within the purview of statutory law—Revised Statutes, sections 4525-4542 and 4565-4571—nor is the remedy sought one known to equity jurisprudence. Every remedy, legal or equitable, having for its object the perpetuation of testimony, is confined to the testimony of witnesses in being. . . .

Respondent, freely conceding that no precedent exists in support of his novel claim, invokes the aid of the general power inherent in equity to provide a remedy where one is lacking for the protection of a right under the maxim, "equity will not suffer a right to be without a remedy." It is true, as urged: "every just order or rule known to equity courts was born of some emergency to meet some new condition and was, therefore, in its time without precedent," and "the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." But however far-reaching and puissant the arm of equity may be, it has its sphere of operation to which it is confined. It supplements and aids the law, does not invade its domain and never works for the destruction of legal right nor in opposition thereto. "Equity will not give a remedy in direct contravention of a positive rule of law." (Bispham's *Princ. of Eq.*, sec. 37; *Story's Eq. Juris.*, sec. 12.)

What is the real aim and object of this proceeding? Stripped of verbal embellishments and reduced to naked fact, it is an attempt to force the admission of incompetent testimony at the trial of the dower suit. That the evidence is incompetent is confessed and urged as a ground for equitable relief. If competent, there is abundant authority in this State justifying its admission without the aid of equity. . . . The decree in this case presents the anomaly of a court sitting as a chancellor making an order upon himself as trial judge to admit as evidence in an action pending before him in the latter capacity the deposition of a deceased witness taken in another cause clearly incom-

petent under elementary principles of law, for this is all the decree amounts to. . . .

The testimony of the witness, now deceased, taken in the form of a deposition over ten years ago in the suit of Smith against the defendant herein and her husband, is incompetent as evidence in the pending dower suit brought by defendant against plaintiff, for the reason that it is hearsay. It is true, the question of title involved in the pending cause is the same as in Smith against this defendant, but the parties are different and there is no privity between the plaintiff in the last-mentioned action and the defendant in the one pending. The land involved in the two suits is different. . . .

SULLIVAN v. PORTLAND, ETC., R. R. CO.

(Supreme Court of the United States, 1876, 94 U. S. 806.)

SWAYNE, J. . . . To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statute bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly. *Wilson v. Anthony*, 19 Barber (Ark.), 16; *Taylor v. Adams*, 14, id. 62; *Johnson v. Johnson*, 5 Ala. 90; *Ferson v. Sanger*, 2 Ware, 256; *Fisher v. Boody*, 1 Curtis, 219; *Cholmondly v. Clinton*, 2 Jac. & Walk. 141; 2 Story's Eq., sect. 1520a.

"A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect

are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." *Smith v. Clay*, Ambler, 645. . . .

SCOTT v. MAGLOUGHLIN.

(Supreme Court of Illinois, 1890, 133 Ill. 33, 24 N. E. 1030.)

SHOPE, C. J. A bill in equity was filed by appellants to foreclose a trust deed dated February 2, 1885, executed by John Magloughlin and wife to John W. Scott, as trustee, to secure the payment of a promissory note of the same date, for \$1000, payable in one year, and made by said John Magloughlin payable to his order, and indorsed by him in blank. The note is claimed by appellants to have been executed for an indebtedness due and owing from Magloughlin to Robert Blair, and to have been delivered to said Robert or to William T. Blair. The blank indorsement had, at the hearing, been filled up by writing over the name of Magloughlin the words, "pay to order of Albert B. Clark." . . .

The defenses set up were, in substance, that there was no consideration for the note, and that the note and trust deed were executed at the suggestion and instance of William T. Blair to cover up the equitable title of Robert Blair in the premises thereby conveyed, for the purpose of defeating the claim for alimony of the wife of said Robert, in a pending proceeding for divorce against him. . . .

Appellants come into a court of equity and ask that the equitable rights of Clark be enforced by a foreclosure of the trust deed. In that proceeding the note is a mere incident to the relief sought, while the trust deed is the foundation of the right to relief in equity. The uniform holding in this State, is that a mortgage is a mere chose in action, and when the powers of a court of equity are called into activity to enforce it, relief will be denied if there are equitable reasons why its power should be withheld, or if, in equity and good conscience, the relief asked should be granted. It may be conceded that if Clark was an assignee for value before maturity of the note (which he was not), he would, under the statute respecting negotiable instruments, be protected against these defenses in a suit upon the note; yet, the trust deed not being negotiable, the right resting in him would be an equitable

right only, and he would take it subject to the legal and equitable defenses to which it was liable before it came to his hands. There are some exceptions to the rule, perhaps; but upon examination it will be found that the right of Clark falls within none of them. A court of equity, when its power is invoked, will not deprive a party, unless controlled by some inflexible rule of law, of such defenses, either legal or equitable, as are intrinsically just in themselves, or permit the complainant to recover contrary to the principles of equity. *Olds v. Cummings et al.*, 31 Ill. 188; *Sumner et al. v. Waugh et al.*, 56 id. 538; *Walker v. Dement*, 42 id. 280; *Thompson v. Shoemaker*, 68 id. 256; *Bryant v. Vix*, 83 id. 14. . . .

HERCY v. BIRCH.

(High Court of Chancery, 1804, 9 Vesey 357.)

By Indentures, dated the 1st of June, 1787, between Lovelace Hercy, Thomas Birch, and Abraham Henry Chambers, reciting, that they had on the 25th of March last commenced co-partners in the business of a banker, it was agreed, that they should continue to carry on the said business for the term of ten years; and that in case any or either of them should after the expiration of that partnership continue to carry on the business of a banker, either alone or in partnership with any other person, until any one or more of the parties to the indenture should have a legitimate or illegitimate son, whom the father should by writing or by his will desire to have introduced to the said business, and who should live to attain the age of sixteen, the party or parties to the indenture, who should so carry on the said business of a banker, should take such son, whether legitimate or illegitimate, apprentice for five years; and after the expiration of such apprenticeship should receive him into the partnership, then carried on by any of the parties, and admit him to an equal share with the then partners, so soon after his age of 21 as might be; but not till after 20 years from the date of the indenture. . . .

The bill was filed by that illegitimate son, having attained sixteen years of age, against the partners, praying, that the Defendants may be decreed specifically to perform the agreement in the said indenture, and take the Plaintiff apprentice, and at the expiration of the appren-

ticeship admit him to an equal share of such business &c. . . .

The Lord Chancellor (Eldon). . . . As to the question, whether this Court would decree execution of such a covenant, if the law had determined, that he might have damages against them for refusing to take him apprentice, it would be difficult to refuse him the ordinary relief this Court gives; but what rule is to form his share of the profits? With respect to the object of this covenant, no one ever heard of this Court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards.

I am of opinion, this is such a covenant, as this Court cannot specifically execute.

The bill was dismissed.

CHAPTER II. SPECIFIC PERFORMANCE OF CONTRACTS.

SECTION I. IN GENERAL

DARST v. KIRK.

(Supreme Court of Illinois, 1907, 230 Ill. 521, 82 N. E. 862.)

HAND, C. J. . . . The law is well settled that parties to a suit cannot ordinarily confer jurisdiction upon a court over the subject-matter of a suit by stipulation or consent where by law the jurisdiction of the subject-matter of the suit has been conferred upon another court. To illustrate: The parties to an action at law could not, by stipulation or consent, confer upon a court of chancery jurisdiction to try an action of trespass or slander, and in such case the decree of the court, if entered, would doubtless be a nullity, although the jurisdiction of the court passed unchallenged: There is, however, another class of cases, involving matters of contract and the like, which, while they do not come within the ordinary jurisdiction of a court of equity, yet only want some equitable element to bring them within such jurisdiction, and in such cases the defendant by his action may estop himself to afterward raise the question of jurisdiction in the trial or upon appeal. In both cases there is a want of jurisdiction. In the first there is a total want of power to hear and determine the case, and in the other the want of power is not absolute, but qualified. In the first class a stipulation or consent conferring jurisdiction would be void, while in the latter class it would be binding upon the parties. (Richards v. Lake Shore and Michigan Southern Railway Co., 124 Ill. 516.) In this case a partnership had existed between the appellant and appellee, and while they had transferred the partnership property and business to the corporation organized by them under the name of the Rex Manufacturing Company, it does not appear that there had been a settlement of said partnership matters between them, and the

stock for which the \$3,000 was received was stock of the corporation received in payment of the partnership business turned over to the corporation.

The settlement of partnership matters and the adjustment of partnership accounts are fruitful sources of litigation and fall within the jurisdiction of courts of equity. If the appellant had been brought into a court of chancery by the filing of a bill and the service of process to answer for non-payment of said \$1,200 in the first instance, there might have been some force in the position that he should have been sued for said sum of \$1,200 in an action at law; but he having been sued in an action at law and thereafter stipulated that the case should be transferred to the chancery side of the docket of the court where it was pending, and that the pleadings should be amended and the case should thereafter proceed as a chancery suit, in view of the fact that the subject-matter of the suit grew out of a partnership matter, we think the suit should be held to fall within the second class of cases above referred to, and that this is a case in which jurisdiction may be conferred upon a court of chancery by the stipulation or consent of the parties, and that the appellant should be held to be estopped by said stipulation from raising the question of the want of jurisdiction in a court of chancery to hear and determine this cause. *City of Chicago v. Drexel*, 141 Ill. 89; *Mertens v. Roche*, 39 N. Y. App. Div. 398. . . .

ST. LOUIS RANGE CO. v. KLINE-DRUMMOND MERCANTILE CO.

(Missouri Court of Appeals, 1906, 120 Mo. App. 438, 96 S. W. 1040.)

GOODE, J. . . . The case is that of a vendee of personal property who has refused to accept the goods bought, and as different rules for the measurement of damages are laid down in such cases according to the circumstances presented, it is essential to fix in mind the important facts of the present controversy. At the time of defendant's refusal to accept any more ranges, plaintiff had on hand six hundred and three, of which about twenty-five were completed and ready for delivery and all the parts of the others were manufactured and ready to be put together. . . .

If the buyer of personalty refuses to accept the subject-matter of the bargain when tendered by the seller in proper condition and at the proper time and place, the law allows the seller several modes of redress. If the contract has been so far performed by the seller that the property is ready for delivery before he has notice or knowledge of the buyer's intention to decline acceptance, he may treat the property as belonging to the buyer, hold it subject to the latter's order and recover the full agreed price; or he may sell it for the buyer's account, taking the requisite steps to protect the latter's interest and get the best price obtainable, and then recover the difference between the proceeds of the sale and the agreed price; or he may treat the sale as ended by the buyer's default and the property as his (the seller's) and recover the actual loss sustained, which is ordinarily the difference between the agreed price and the market price. (*Dobbins v. Edmonds*, 18 Mo. App. 307, 317; *Kingsland v. Iron Co.*, 29 Mo. App. 526; *Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Richey v. Tenbroek*, 63 Mo. 563; *Hayden v. Demetz*, 53 N. Y. 426, 431.) Where specific articles are sold, and especially where they are manufactured pursuant to an order from the vendee, the title is regarded, usually, as having vested in the latter without delivery, so as to give the vendor the right, on refusal to accept, to recover the stipulated price. Under such circumstances the case presented is different from that of a sale of goods generally, like merchandise or corporate stocks currently dealt in, when it is contemplated that specific articles or stocks shall be subsequently selected and delivered pursuant to the contract. (*Bethel St. Co. v. Brown*, 57 Maine 9; *Page v. Carpenter*, 10 N. H. 77; *Brookwalter v. Clark*, 10 Fed. 793; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Mitchell v. LeClaire*, 165 Mass. 305.) The decisions holding vendees responsible for the full contract price in cases of specific articles manufactured for them, proceed on the assumption that they have acquired title to the property and that it is held subject to their order, or else that it is worthless in the hands of the vendors so that the latter cannot partly reimburse themselves for their loss by using or disposing of it. (*Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Crown Vinegar & Spice Co. v. Whers*, 69 Mo. App. 493; *Brookwalter v. Clark*, *supra*.) In the Missouri cases just cited, the property sold had been manufactured and was ready for delivery. The opinion in *Lumber Co. v. Warner* says that when the subject-matter of the contract is specific articles made for the vendee, and the vendor has com-

pleted his contract, it is just that the damages in case of refusal to accept the goods shall be their contract price; but that the vendor will hold the property for the vendee. In *Mitchell v. LeClair*, *supra*. the defendant had ordered sixty tubs of butter which plaintiff set apart for him, but he subsequently refused to take it. Referring to these facts, the court said that if the vendee in such case refused to take the goods and pay for them, the vendor might recover the price, if he kept the goods in readiness for delivery to the purchaser. It sometimes happens, as in the instance of a suit of clothes made for a person, or a portrait painted for him, that the thing sold is obviously worthless to any one else and then, we apprehend, the seller could recover the full price on the purchaser's refusal to accept without regard to whether the contract was still executory, provided it had been performed to the extent of having the subject-matter of it ready for delivery. (*Allen v. Jarvis*, 20 Conn. 38.) This is not such a case; for it is apparent that the unaccepted ranges had a value either as scrap iron or as ranges; and, indeed this proposition is conceded. We have said that plaintiff did not elect either to hold the ranges as defendant's property to be delivered on demand, or sell them for defendant as its agent. On the contrary plaintiff treated the ranges as its own and proceeded to sell them from time to time. In view of this fact, defendant is entitled to a deduction of the value of the ranges from the agreed price. . . .

MOSS & RALEY v. WREN.

(Supreme Court of Texas, 1909, 102 Texas 567, 113 S. W. 739, 120 S. W. 847.)

GAINES, C. J. . . . The appellants were employed as real estate brokers to make sale of certain land belonging to appellee, and having effected, as they claimed, a sale to one Clark, brought suit for their commission. In the contract for the conveyance of the land, after specifying the price, consideration, etc., the following stipulation was inserted: "And it is further mutually agreed in case purchaser fails to comply with the terms hereof relating to the payment and securing of the purchase price as above mentioned and by the time herein designated, purchaser shall forfeit the amount paid hereon to seller and

the same shall be paid to seller by said trustees and accepted by said seller as and for liquidated damages for such injury and damage as the seller may suffer by reason of the nonperformance of this contract on the part of the purchaser."

The question certified for our determination is, whether upon this contract a sale was effected so as to entitle the appellants to their commission.

We have numerous decisions holding that, although there is a stipulation in the contract of this character, payment of a fixed sum of money as liquidated damages does not affect the contract for sale of the land but that the seller can enforce specific performance. (*Hemming v. Zimmerschitte*, 4 Texas, 159; *Williams v. Talbot*, 16 Texas, 1; *Vardeman v. Lawson*, 17 Texas, 11; *Bullion v. Campbell*, 27 Texas, 653; *Gregory v. Hughes*, 20 Texas, 345).

It seems to us that these decisions are decisive of the case. If the vendor of the land can enforce a specific performance of the contract to pay for it, then the broker has effected a sale, valid in law, and is entitled to his compensation. We have also examined the authorities cited in the certificate upon the same proposition and find it is amply supported by them. (*Lyman v. Gedney*, 29 N. E., 282; *Hull v. Sturdivant*, 46 Me., 34; *Hooker v. Pyncheon*, 74 Mass. (8 Gray), 550; *Ewins v. Gordon*, 49 N. H. 444; *O'Connor v. Tyrrell*, (N. J. Eq.), 30 Atl., 1061; *Palmer v. Bowen*, 34 N. E., 291, affirming s. c. in 18 N. Y. Supp., 638; *Kettering v. Eastlack*, 107 N. W., 177).

We therefore answer the question submitted in the affirmative and say that the contract is such that appellee is entitled to have it specifically enforced, and that therefore the appellants are entitled to their commission for making the sale.

Opinion filed December 2, 1908.

ON REHEARING.

GAINES, C. J. Upon consideration of the motion for a rehearing in this case we are of opinion that we erred in disposing originally of the question.

Referring to the stipulation quoted at the end of the statement of the case it is to be noted that it provides that the \$1,000 put up as

a forfeit "shall be paid to the seller by said trustees and accepted by said seller as liquidated damages for such injury and damage as the seller may suffer by reason of the non-performance of this contract on part of the purchaser." Now, it occurs to us that if nothing had been said as to the acceptance of the \$1,000 by the seller, our original opinion would have been correct. But if the seller is bound to accept the sum for such damages as may be suffered by reason of the non-performance of the contract on part of the purchaser, can he sue the proposed purchaser for specific performance of the contract? The contract evidently was that the proposed purchaser should have until a future day to pay the price and accept a conveyance, yet should he decline for any reason to pay the price and to accept the land, he may pay the liquidated damages and be absolved from further suit.

Moss & Raley entered into a contract with Clark to sell him certain lands and stipulated that in case he failed to buy, he should forfeit \$1,000 which had been put up to enforce the bargain. He chose to forfeit the \$1,000 which absolved him from further obligation.

Before Moss & Raley were entitled to their commission they should have procured a purchaser who was willing to enter into a contract to purchase the land absolutely.

For this reason we answer the question in the negative.

Opinion filed June 23, 1909.

DILLS v. DOEBLER.

(Supreme Court of Errors of Connecticut, 1892, 62 Conn. 366, 26 Atl. 398.)

ANDREWS, C. J. The plaintiff and defendant in June, 1890, entered into a contract for the lease of certain rooms in the city of Hartford and the practicing of dentistry therein, the eighth paragraph of which contained these clauses:—

"And the said Doeblor, in consideration of the premises, does further covenant and agree to and with the said Dills, that he, the said Doeblor, will not, at any time within ten years after the termination of this contract, engage in or carry on directly or indirectly within the limits of fifteen miles of said Hartford, the business or profession of a dentist, or any branch of the same, either as principal, employee,

agent or partner, or in any manner or form or in any capacity whatever:—Provided, and it is hereby understood and agreed by and between the parties hereto, that in the event of the said Dill's failure to retain said rooms for said practice by reason of the said Dills-Hinckley lease, then and in that event this section of the contract becomes void by said Doeblor paying to said Dills five hundred dollars, and giving bond in like sum that he, the said Doeblor, will not use the term 'Associate Dentists' in connection with announcing or advertising a future practice of dentistry in said Hartford. . . . And it is further mutually understood and agreed by and between the parties hereto that the said Doeblor may be at liberty to practice dentistry in said Hartford at any time after the termination of this contract, by the paying to said Dills of one thousand dollars, and giving such bond as is hereinbefore alluded to in reference to the term 'Associate Dentists.' ” . . .

An examination of the agreement between these parties makes it evident that they were contracting upon the theory that the defendant was to resume the practice of dentistry in Hartford upon his own accord when the contract should be terminated. He was of course to pay for the right so to resume. The section quoted in its earlier part spoke of a termination of the contract by reason of the failure of the plaintiff's title to the rooms. In such event it is entirely certain that the defendant would have the right to engage in dentistry upon paying four hundred dollars, for it is provided that the section was then to become void. The latter part of the section speaks of the termination of the contract from any other cause. Then the defendant is required to pay one thousand dollars in order “to be at liberty to practice dentistry in said Hartford.” In the one case the defendant was to pay four hundred dollars, in the other one thousand. But in respect to his liberty to resume business on his own account there is no distinction. In either case the contract stipulates for damages and not for the removal of competition. The contract presents an alternative. It virtually says to the defendant—“If you enter into the business of dentistry in Hartford after the termination of this agreement, you must pay to the plaintiff the damages named.”

The language used indicates this thought; and there is nothing in the relation of the parties, or in the business of dentistry, nor in the surrounding circumstances, to indicate otherwise. Presumably

there are many dentists in the city of Hartford. Lessening their number by one could not benefit the plaintiff in any perceptible degree. Nor would the defendant by practicing there be likely to injure the plaintiff at all seriously. The plaintiff having contracted to take damages must seek his remedy in a court of law.

FOSTER v. KIMMONS.

(Supreme Court of Missouri, 1874, 54 Mo. 488, 26 Am. Dec. 661, 663 note.)

VORIES, J. . . . In the case under consideration, the evidence shows, that the contract, which is asked to be specifically performed, was a gift of a piece of land, upon which is situated a celebrated spring; that the defendant, or donor, had a larger tract of land at and constituting the spring tract; it is not pretended that the whole tract of land was included in the gift; no mention is made in the evidence of the quantity of the land given, either by referring to its legal subdivisions, or otherwise. The only evidence, tending in that direction, is, that the defendant, while riding over the land, had pointed out to the witness a tree at a considerable distance, which he supposed was near where one corner of the land would be, and he had also stated the course which he supposed one line of the land would run. This is the only description given, while the evidence clearly shows, that the son, to whom the land is charged to have been given, did not claim the whole of the spring tract. It is impossible, therefore, to ascertain from any contract or gift proven what part, or how much, of the tract was given or intended to be given; the only evidence being, that one line of the land was supposed to be near a certain tree, without anything to indicate the number of acres given, or where the other lines were, or were supposed to be. It must at once be perceived, that it would be impossible for a court of equity to specifically perform the contract, and know the very contract made, or intended by the parties, was being performed as to the quantity and boundaries of the land. The court would have to first make the contract, and then perform it. This a court of equity can never do. It follows, that the plaintiffs' petition was, for this reason, properly dismissed.

PADDOCK v. DAVENPORT.

(Supreme Court of North Carolina, 1890, 107 N. C. 710, 12 S. E. 464.)

SHEPHERD, J. Two causes of action are set out in the complaint,—one for damages for breach of the contract, and the other for its specific performance. The court held, upon demurrer, that neither of the said causes of action could be maintained. . . .

The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiff. The true principle upon which specific performance is decreed does not rest simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character “simply because,” says Pearson, J., in *Kitchen v. Herring*, 7 Ired. Eq. 191, “it is land,—a favorite and favored subject in England, and every country of Anglo-Saxon origin.” The law also attaches a peculiar value to ancient family pictures, title-deeds, valuable paintings, articles of unusual beauty, rarity, and distinction, such as objects of vertu. A horn which, time out of mind, had gone along with an estate, and an old silver patera, bearing a Greek inscription and dedication to Hercules, were held to be proper subjects of specific performance. These, said Lord Eldon, turned upon the *pretium affectionis*, which could not be estimated in damages. So, for a faithful family slave, endeared by a long course of service or early association, Chief Justice Taylor remarked that “no damages can compensate, for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart.” *Williams v. Howard*, 3 Murph. 80. The principle is also applied where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the circumstances of the case, that a specific performance is indispensable to justice. Such was formerly held as to the shares in a railway company, which differ, says the court in *Ashe v. Johnson*, 2 Jones, Eq. 149, from the funded debt of the government, in not always being in the market and having a specific value; also a patent,

(*Corbin v. Tracy*, 34 Conn. 325); contract to insure (*Carpenter v. Insurance Co.*, 4 Sandf. Ch. 408); and like cases. The general principle everywhere recognized, however, is that, except in cases falling within the foregoing principles a court of equity will not decree the specific performance of contracts for personal property; "for," remarks Pearson, J., in *Kitchen v. Herring*, *supra*, "if, with money, an article of the same description can be bought, . . . the remedy at law is adequate." See, also, Pom. Spec. Perf. 14. Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the court. The trees were purchased with a view to their servance from the soil, and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the conveniences of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased "a few trees of like kind," in the vicinity, sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this nature may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained. . . .

SECTION II.—AFFIRMATIVE CONTRACTS

GARTRELL v. STAFFORD.

(Supreme Court of Nebraska, 1882, 12 Nebr. 545.)

MAXWELL, J. This is an action to enforce the specific performance of an alleged contract for the conveyance of real estate. . . .

The second objection of the appellant is that the plaintiff has an adequate remedy at law in an action for damages. The rule contended for by the appellant undoubtedly applies to contracts for the sale of personal property, the reason being that damages in such cases are readily calculated on the market price of property such as wheat, corn, wool, etc., like quantities of the same grade being of equal value, and thus afford as complete a remedy to the purchaser as the delivery of the property. *Adderley v. Dixon*, 1 Sim. & Stu. 607. But the rule is a qualified one and is limited to cases where compensation in damages furnishes a complete and satisfactory remedy. *Story's Eq.*, S. 718, and cases cited in note 3. The jurisdiction of courts of equity to decree specific performance of contracts for the sale of real estate is not limited, as in cases respecting chattels, to special circumstances, but is universally maintained, the reason being that a purchaser of a particular piece of land may reasonably be supposed to have considered the locality, soil, easements, or accommodations of the land, generally, which may give a peculiar or special value to the land to him, that could not be replaced by other land of the same value, but not having the same local conveniences or accommodations. *Adderley v. Dixon*, 1 Sim. & Stu., 607, *Story's Eq.*, sec. 746. *Willard's Eq.*, 279. An action for damages would not, therefore, afford adequate relief.

LOSEE v. MOREY.

(Supreme Court of New York, 1865, 57 Barb. 561.)

BOCKES, J. . . . As a general rule, the specific performance of contracts rests in the discretion of the court. It is not, however, an individual or arbitrary discretion, but a judicial discretion which conforms itself to general rules and settled principles. The right to have specific performance is a positive right, neither to be exercised or withheld capriciously, or simply at will. When all is fair, and the parties deal on equal terms, it is a universal rule, in equity, to enforce contracts for the sale of lands specifically, at the demand of either the vendor or vendee; and in such case it is as much the duty of the court to decree specific performance of the contract as it is

to give damages for its breach. (Willard's Eq. 280. Story's Eq. No. 746, 751, 9 Vesey, 608. 12 id. 395, 400. 3 Cowen, 445. 6 Bosw. 245.) In the last case cited the court remarks that the discretion to be exercised in these cases, "is governed, for the most part, by settled rules; and where a plaintiff is seeking a relief to which by such rules he is clearly entitled, and no substantial defense to his claim is established, the relief may not be capriciously denied." It follows, therefore, that if a contract for the sale and purchase of lands has been fairly obtained, without misapprehension, surprise, mistake or the exercise of any undue advantage, and it be not unconscionable in its terms, the right of the parties to its specific performance is a settled and positive right, which the court is bound to maintain and enforce. It is insisted, in the next place, that the case is not of equitable cognizance, because the plaintiff has, as is urged, a perfect remedy at law, on the contract, for damages. This objection is not available in a case like this, where the contract is for the purchase and sale of lands. In such case the vendee is not deemed to have a perfect remedy in an action at law for damages. He is entitled to the land, according to the terms of the purchase. A compensation in damages will not afford adequate relief; "for the peculiar locality, soil, vicinage, advantage of markets and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value."

LEACH & WIFE v. FOBES.

(Supreme Court of Massachusetts, 1858, 11 Gray (Mass.) 506.)

BIGELOW, J. . . . Nor have we any doubt as to the right of the plaintiffs to ask for the enforcement of this contract by a decree in chancery. The remedy at law is not adequate and complete. The agreement is not one for the transfer of shares in a corporation merely. It is a contract also for the conveyance of a certain right or interest in real estate, which is an appropriate subject for specific relief in equity. The court has jurisdiction to decree that the land which is the subject of the agreement shall be conveyed to the plaintiffs; and, as it will give relief for this part of the contract, it will also entertain jurisdiction of the whole agreement, and enforce the other stipulations

respecting the transfer of shares in the incorporated companies named in the bill, instead of turning the party over to seek his remedy therefor by an action at law. The more recent authorities are quite decisive as to the authority of a court of chancery to decree the specific performance of a contract for the transfer of shares in joint stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount and the number of shares is limited. *Duncuft v. Albrecht*, 12 Sim. 189, *Shaw v. Fisher*, 2 De Gex & Sm. 11, and 5 De Gex, Macn. & Gord. 596, *Cheale v. Kenward*, 3 De Gex & Jon. 27. But without deciding whether a suit in equity can be supported for sole purpose of enforcing a contract for the sale of shares in a corporation, we are of opinion that such an agreement may be enforced in equity when it forms part of a contract for the sale and transfer of real estate, and the suit is brought for the conveyance of the land as well as for the transfer of the shares. Decree accordingly.

McNAMARA et al. v. HOME LAND & CATTLE CO. et al.

(Circuit Court of Montana District, 1900, 105 Fed. 202.)

KNOWLES, D. J. . . . The case was brought to compel the specific performance of a contract for the sale and delivery of certain personal property, described in the bill herein, and situated within the state of Montana. . . . It is evident that this construction of the contract contended for on the part of the said cattle company would force the complainants to seek redress for said cattle company's breach of this contract in the state of Missouri, and that the complainants could not have done so with any assurance of obtaining complete redress in Montana. It is an important consideration in this case as to whether sufficient equities have been presented to justify this court in awarding specific performance of this contract. The master has found that the cattle company is solvent. He has found, however, that the property of said company chiefly consists of an indebtedness due it from the St. Louis Stamping Company, a Missouri corporation and doing business in that state. What the nature of this indebtedness is, and how it is evidenced does not appear. When such indebtedness becomes due is also a matter not in evidence, or determined by the

findings of the master. A party should not, under the circumstances presented by this case, be compelled to seek a foreign jurisdiction to collect damages for the breach of a contract when he has in his own hands the means of remunerating himself therefor. *Johnson v. Brooks*, 93 N. Y. 343. In the case of *Clark v. Flint*, 33 Am. Dec. 733, it is held that, where the remedy at law would be against a person actually insolvent, such legal remedy would not be adequate, and would be a ground for equitable jurisdiction. In 22 Am. & Eng. Enc. Law, 992, it is stated that the insolvency of a defendant is a ground for equitable relief, where the specific performance of a contract for the sale of chattels is presented. As far as the defendant the Home Land & Cattle Company is concerned, I think it may be treated as if insolvent in Montana. It had not the means wherewith to liquidate complainants' claims on account of the deficiency of the cattle above mentioned, if complainants paid to the defendant bank the amount due for the last delivery of cattle made to them. The cattle gathered by the defendant the Home Land & Cattle Company in the year 1898 were upon the range, and scattered, and it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand. With this view of the law and the facts presented in this case, I have reached the conclusion that sufficient equities are presented to entitle complainants to the relief prayed for in their bill. It is therefore ordered that complainants have a decree for the specific performance of this contract as to the cattle and horses described in the bill.

CORBIN v. TRACY.

(Supreme Court of Connecticut, 1867, 34 Conn. 325.)

Bill in equity, brought by the petitioners, a joint stock corporation, to the superior court for Hartford county, to compel the specific performance of a contract to assign a patent right. The superior court (Loomis, J.) passed a decree in favor of the petitioners, and the respondents filed a motion for a new trial and a motion in error. The case is sufficiently stated in the opinion.

CARPENTER, J. . . . The ground of the jurisdiction of a court of equity in this class of cases, is, that a court of law is inadequate

to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Whenever, therefore, the party wants the thing *in specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story's Eq. Jur. Nos. 717, 718.

The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and personal estate, but upon the ground that damages at law may not in the particular case, afford a complete remedy. 1 Story's Eq. Jur., §§ 716, 717, 718 and cases there cited; *Clark v. Flint*, 22 Pick., 231. When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty. 3 Parsons on Contracts (5th ed.) 373.

An application of these principles to the case before us relieves it of all difficulty. The contract relates to a patent right, the value of which has not yet been tested by actual use. All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole we are satisfied that justice can only be done, in a case like this, by a specific performance of the contract.

LEWIS v. LORD LECHMERE.

(English Court of Chancery, 1721, 12 Modern Reports, 504.)

This was a bill brought by the plaintiff for a specific performance of articles, bearing date the thirtieth day of August 1720, whereby Lord Lechmere had covenanted to purchase such an estate at forty years purchase; provided the plaintiff did, on or before the tenth day of November following, lay such an abstract of the title before Lord Lechmere's Counsel, as they should approve. . . .

It was said by the counsel for the defendant, that though in case of articles entered into for the purchase of lands, the vendee may undoubtedly exhibit his bill in equity for the specific performance of these articles; yet it might admit of a doubt, whether the vendor might do the same. As to the vendee, though he has an action at law upon the articles, yet that sounds only in damages; and therefore he may come into equity for the land, which on several accounts may possibly be more desirable to him than any pecuniary compensation. But for the vendor, he only desires to have the money; and that, whether it be recovered at law in damages, or in equity, is but money still. If it be said, that at law the jury may at their own liberty and discretion, give him what damages they upon all the circumstances of the case think reasonable; whereas upon a bill in equity, your lordship has no power to vary from the sum contracted for in the articles, be the circumstances of the case what they will; this seems to be a very odd reason for coming into a court of equity, and the reverse of what generally intitles people to relief in equity.

But to this it was answered, that upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too; that the remedy the vendor had at law, was not a remedy adequate to what he had in this court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum. . . .

GOTTSCHALK v. STEIN & LEOPOLD.

(Court of Appeals of Maryland, 1888, 69 Md. 51.)

ROBINSON, J. . . . Now in this case, the appellant agreed to sell to the appellees the three promissory notes of Weiller & Son, and the appellees agreed to buy these notes for a specific purpose, which was known to the appellant. An action at law for a breach of the contract, would not, it is clear, give to the appellees the subject-matter of the contract. And besides, the damages to be recovered must necessarily be uncertain. The face value of the notes is seven thousand five hundred dollars, and the appellant agreed to sell and transfer them to the appellees, upon the payment of three thousand dollars. If the firm of Weiller & Son was perfectly solvent, there would be no difficulty in determining the measure of damages. But the firm, the record shows, was insolvent, their assets being insufficient to pay their debts. And in an action at law the measure of damages would depend upon the personal ability of the members of the firm to pay the amount due on the notes, and this being uncertain, the damages to be recovered must also be uncertain. The legal remedy under such circumstances would fall short of that redress to which the appellees are justly entitled, and is not, therefore, as beneficial to them as the specific performance of the contract.

There is no distinction, it seems to us, between this case and *Wright and others v. Bell*, 5 Price, 325. There the assignees in bankruptcy, agreed to sell a debt of £550 due the bankrupt for £500, and the defendant having refused to pay the £500, a bill was filed for the specific performance of the contract, and it was argued that the remedy of the plaintiff was by an action at law for a breach of the contract. But the Lord Chief Baron held, that although equity would not, as a general rule, enforce the performance of contracts, for the sale of chattels, yet a contract to sell a specific debt, was an exception to the rule. And then again in *Adderley v. Dixon*, 1 Sim. & Stu., 607, where the plaintiff being entitled to a dividend in two bankrupt estates, agreed to sell the claims for 2s. and 6d. in the pound, Sir. John Leach, Vice-Chancellor, said:

"Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because

damages at law may not, in the particular case, afford a complete remedy. The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of *Ball v. Coggs*, 1 Bro. P. C., 140, and *Taylor v. Neville*, (cited in 3 Atk., 384,) a Court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages, would be to compel him to sell these dividends at a conjectural price." So in this case, the damages at law being uncertain on account of the failure of *Weiller & Son*, the appellees are entitled to the specific performance of the contract.

RUTHERFORD v. STEWART.

(Supreme Court of Missouri, 1883, 79 Mo. 216.)

HENRY, J. This is a proceeding by injunction to restrain defendants from taking and using certain brick made by Helflin & Sheperdson on a tract of land owned by plaintiff. Helflin & Sheperdson agreed to manufacture brick and pay Rutherford for the use of the ground, and gave him a mortgage to secure him the price they were to pay and for certain advancements of money for them, upon one kiln of bricks, to contain 100,000 bricks. . . .

Afterward, on the 22nd day of July, 1878, said mortgagor executed to defendant Stewart, a mortgage of "all the bricks now being moulded at the brick-yard, on the land of W. T. Rutherford. . . . and all the bricks that will be moulded and turned at said brick-yard, during the season for such work of 1878, commencing on the 29th day of July, 1878," to secure a promissory note of that date for \$250, payable to said Stewart. . . .

A second mortgage was executed by said Sheperdson & Helflin to Rutherford, after the second kiln was burned, to secure a debt to Rutherford of \$502, advanced by Rutherford and used by the firm, to make said brick. . . .

The only question in the case is whether the mortgage to Stewart was a valid mortgage, the appellant contending that it was of personal

property not then in existence, and, therefore, conveyed nothing. Of the brick then made, it was certainly a good conveyance, and that, in equity, it covered all the brick made when Rutherford took his second mortgage, we think equally clear. As between Stewart and the mortgagers, and persons claiming under the latter, with actual notice of the mortgage, the mortgagee's equitable right to the property would seem to be unquestionable. If the entire kiln was completed when plaintiff took his second mortgage, he took it subject to the first, and on no principle of equity, can he be entitled, as against Stewart, to any of the bricks except such as were made after his, Rutherford's mortgage was executed.

That the mortgage of Stewart took effect upon the bricks in the kiln when it was executed, is not questioned. The other propositions above stated, were discussed in *Wright v. Bircher*, 72 Mo. 179, in which this court approved what was said by Mr. Justice Story in *Mitchell v. Winslow*, 2 Story 630, and by Davis, J. in *Morrill v. Noyes*, 56 Me. 458; s. c., 3 Am. L. Reg. (N. S.) 18. Justice Story observed: "It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether *in esse* or not, it attaches, in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires title thereto, against the latter and all persons asserting a claim thereto, either voluntarily or with notice, or in bankruptcy." . . .

CARPENTER v. THE MUTUAL SAFETY INSURANCE COMPANY.

(New York Court of Chancery, 1846, 4 Sandf. Ch. 436.)

Demurrer. The bill set forth an agreement for insurance made by the authorized agent of the defendants, the terms of which were fully stated, the payment of the stipulated premium by the complainant to the defendants, and the omission of the latter to execute a policy of insurance conformably to the agreement, on being requested. The bill also stated the loss of the premises insured, and the complainant's consequent right to recover the amount agreed to be insured.

The prayer was for a payment of the loss and for general relief. The defendants demurred to the bill for want of equity. . . .

THE VICE-CHANCELLOR. The circumstance that the bill seeks performance of a contract relating to personal property, is not of itself a valid ground of demurrer. There are many instances in which equity compels a specific performance of such contracts.

The real, serious objection to the bill, is that the complainant has an adequate remedy at law.

I think, however, that it is now the established doctrine, that the insured may, in such a case, resort to a court of equity.

In *Perkins v. The Washington Insurance Company*, 4 Cowen, 645, our highest court maintained a suit like this in all respects. The defendant there was a corporate body, which answers under its seal and makes no discovery.

It is true that the report of the case does not show any discussion of the question of jurisdiction in the court below, or that the point was presented. But the severe litigation of the cause, the eminent counsel engaged in it, and the opinion of Senator Colden, furnish strong evidence that the law was deemed to be too well settled, to warrant any debate in regard to it.

That learned judge says, in his opinion (p. 661), that the receipt for the premium "answers all the use of a policy, except that the latter authorizes the assured, in case of loss, to sue in a court of law, instead of being obliged to resort, as in this case, to a court of chancery."

The case cited has ever since been regarded as decisive of the jurisdiction in equity. Thus, the now chief justice, in delivering the opinion of the supreme court, in *Lightbody v. The North American Fire Insurance Company* (23 Wend. 18, 25), speaking of a state of facts similar to those in this bill, says, "if his remedy at law was questionable" (and the judge thought he had such a remedy by an action on the case), "he had a perfect equitable right to the delivery of the usual policy, which he might have enforced in the proper forum;" citing *Perkins v. The Washington Insurance Company*. . . . With these authorities, and I may add, the very general understanding of the profession for a long period that such is the law, I have no doubt as to the jurisdiction in this case. It surely can make no difference in respect of the jurisdiction, that the loss insured against has occurred.

The only ground upon which it can be maintained, is for a specific performance by the execution and delivery of a policy. The further relief by decreeing payment, where there has been a loss, is merely incidental, and to avoid expense. Now take the instance of an agreement to insure, where there has been no loss. The right of the assured to receive a policy is perfect and may be enforced immediately, the premium having been paid. An action at law in such a case would be worse than useless to him, for he could recover no more than nominal damages. The value of a policy, previous to a loss, would not be sufficient to carry the costs of a suit at law.

In this respect it is wholly unlike the contract to deliver bills or notes payable at a future day, on a sale of goods. There, on a failure to deliver the bills or notes, an action lies upon the special agreement, in which the damages may be at once ascertained and full justice done, by giving the price of the goods sold. Here, after a barren recovery at law for the non-delivery of the policy, if a loss occurred, another suit must be brought for the real damages; and in the second suit, the assured would probably encounter a plea setting up the first recovery as a bar to a further prosecution.

It is obvious that a suit at law, before a loss, is an inadequate, if not a fatal mode of redress. And as I have remarked, the principle of the jurisdiction in equity, is the same whether a loss has occurred or not. It therefore cannot be taken away or impaired, if perchance the remedy at law, when first invoked after a loss, may lead to the same results.

The demurrer must be overruled with costs, and the usual order entered.

STUART v. PENNIS.

(Supreme Court of Virginia, 1895, 91 Va. 688, 22 S. E. 509.)

RIELY, J. This is a suit in equity to compel the specific performance of a contract in writing for the sale of growing timber trees. Upon a demurrer to the bill, it was dismissed by the court.

There was and could be no objection urged against the relief sought growing out of any indefiniteness as to the terms of the contract, or as to its subject-matter. The defense of the appellee was that the subject of the contract was personal property, and not an interest in

real estate; and being personal property, and there also being an adequate remedy at law for the breach of the contract, a court of equity would not specifically enforce it.

On the other hand, counsel for the appellant claimed that standing trees so pertain to the soil that a contract for their sale is in law a sale of an interest in land; and that as under the general rule, a court of equity will always enforce, in a proper case, the specific performance of a contract for the sale of land (2 Minor's Inst. 867; and Pomeroy on Specific Performance of Contracts, sec. 10), such relief should have been granted in this case. . . .

Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land just as are the coal, the iron, the gypsum, and the building stone which enter so largely into the business of commerce. Attached to the soil, they pass with the land as a part of it. A conveyance of the land carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of the ancestor they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not treated as personalty. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in, or are a part of, the land, and must be so treated by the courts.

We are the better satisfied with the conclusion reached, in that it has the merit of being easily understood and readily applied, not only to this particular industry, but to the many other useful, varied, and boundless natural products of a similar kind of the section of the State whence this case comes, in whose development its people are becoming more largely engaged year by year. But if the contract was not to be treated as a sale of an interest in land, of which it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for the breach of it, we are, nevertheless, of the opinion that it would be a proper case for the enforcement of the contract. While the doctrine is well established that a court of equity will not, in general, decree the specific

performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties.

The true equity rule is thus laid down in Story's Equity J., sec. 33: "The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require."

The remedy at law would fall short in the case at bar of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. Where the fulfillment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As is said by Pomeroy in his book on Contracts, sec. 15: "To compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess."

Then again, the trees included within the body of land described in the contract and bought by the appellant have not been marked or counted, and he has been forbidden by the appellee to mark or disturb them. He has no way of ascertaining their number but by going on the land and marking and counting them. After being forbidden to do this, he is without the means of ascertaining the number of the different kinds of trees purchased, and without knowing their number, it is not possible to ascertain his damages. The remedy at law in this case would clearly be neither adequate nor complete.

For the foregoing reasons, we are of opinion that the court erred in sustaining the demurrer to the bill, and the decree complained of must be reversed.

RECTOR OF ST. DAVID'S v. WOOD.

(Supreme Court of Oregon, 1893, 24 Ore. 396, 34 Pac. 18.)

MOORE, J. . . . The record shows that the stone which defendant agreed to furnish is of a peculiar kind, color, quality, and texture, and that no other stone of like character can be procured; that he had furnished enough of such stone to build about two-thirds of the walls, and if plaintiff cannot procure a sufficient quantity of the same kind to complete the work, it will be necessary to use other stone and thus destroy the beauty and harmony of its building, or the walls must be taken down and rebuilt with other stone; that defendant is insolvent, and therefore unable to complete his contract, although he has received nearly the whole consideration therefor. Under this state of facts, can a court of equity decree a partial performance, so as to carry out as near as possible the original intent of the parties? The contract was to furnish the stone and other material, and erect the walls. The defendant's pecuniary condition precludes a specific performance of that part of his contract which required him to furnish other necessary material and do the labor, if such a decree were possible (Pomeroy, Specific Performance § 293); but if he be incapacitated from performing it in the precise terms, the court will, if it is possible, decree a specific execution according to its substance, by making such variation from unessential particulars as the circumstances of the case require or permit: *Idem*, § 297.

Courts will not generally decree the specific performance of a contract to deliver personal property (Waterman, Specific Performance, § 16), and yet it was held in *Hapgood v. Rosenstock*, 23 Fed. Rep. 86, that "agreements for the assignment of a patent, and for the delivery of chattels which can be supplied by the vendor alone, are among those which will be specifically enforced." This decision was approved by the supreme court of Massachusetts in *Adams v. Messenger*, 147 Mass. 185 (17 N. E. 491). Applying these rules to the case at bar, the defendant has stone which cannot be procured from any other quarry, and plaintiff must use it or the harmony of its building will be marred, and since the defendant cannot be required to do that which his pecuniary condition forbids, he can be negatively required

to specifically perform the contract by compelling him to allow the plaintiff to take the necessary stone to complete the building. . . .

EQUITABLE GAS LIGHT CO. v. BALTIMORE COAL TAR
& MANUFACTURING CO.

(Court of Appeals of Maryland, 1885, 63 Md., 285.)

ALVEY, C. J. . . . It is certainly a well recognized general principle by Courts of equity that they will not decree specific performance of contracts for the sale of goods and chattels, not however because of the nature of the property, the subject-matter of the contract, but because damages at law, calculated on the market price of the goods and chattels bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor. 2 Sto. Eq., sec. 717; *Sullivan vs. Tuck*, 1 Md. Ch. Dec., 63. But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy at law in the particular case, or the special and peculiar nature and value of the subject-matter of the contract. In the 2nd vol. of Story's Equity, sections 718 to 725, the general rule, with the exceptions thereto, will be found fully discussed, with reference to all but the very recent cases. And among the cases forming exceptions to the general rule, there is one stated of a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by instalments, of which specific performance was decreed; for the reason, as supposed by the author, that, under the particular circumstances of the case, there could be no adequate compensation in damages at law; for the profits upon the contract being dependent upon future events could not be correctly estimated in an award of present damages. And so in the case put by Lord Hardwicke, in the case of *Buxton vs. Lister*, 3 Atk., 385, and repeated by Judge Story, as an apt illustration; a man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller; and in such case a specific performance would seem to be indispensable to justice. And so Mr. Pomeroy in his excellent work on Specific Performance of Contracts, sec. 15, p.

20, states it as a well settled principle in the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plaintiff could not be indemnified by any such amount of damages as he could recover at law.

In this case the allegation is that the coal tar contracted to be supplied by the defendant is indispensable to the business of the plaintiff, and that the latter cannot otherwise obtain a supply in the City of Baltimore, and that if the defendant were permitted to withhold the supply, the plaintiff would be subjected to great additional expense and labor in procuring the material from distant cities. This gives the material a special and peculiar value to the plaintiff in Baltimore, and makes it specially inequitable in the defendant to refuse to perform its agreement. As was said by the Chancellor in *Sullivan v. Tuck*, supra, it would be impossible, or at all events extremely difficult, for a Court of law to give the plaintiff adequate damages, that is, to determine and measure the amount of damages which the plaintiff may sustain in the future, by the refusal to allow it to take away the material from the defendant's works, in fulfillment of the contract. The contract, therefore, according to the allegations of the bill, being one of a nature proper to be specifically enforced, the Court will interfere by injunction to restrain the defendant from otherwise disposing of the subject-matter of the contract, though the negative obligation not to otherwise dispose of the material may be only implied from the positive terms of the agreement. This principle is abundantly established by repeated decisions.

Order affirmed, and cause remanded.

O'NEILL v. WEBB.

(Missouri Court of Appeals, 1898, 78 Mo. App. 1.)

ELLISON, J. This action is based on a bill in equity to compel defendant to transfer to plaintiff three shares of stock in the Webb City Ice & Storage Company. The trial court gave plaintiff a decree and defendant appeals. . . .

In the first place the relief sought here by plaintiff is questioned. viz: Compelling defendant to transfer to plaintiff three shares of his stock in the corporation so as to make plaintiff an owner of one half of the entire capital stock. It is contended that full relief may be had in damages. We grant that ordinarily specific performance of a contract for the transfer of corporate stock will be denied. But we think this a proper case for the relief asked. It is an exceptional case. It will be noticed that the contract contemplates not merely the transfer to defendant of three shares of stock, but that he shall transfer stock sufficient that plaintiff shall be the owner of one half of the entire stock. The words of the contract are "one half of all the stock" of the corporation.

It so happens, in this case, that added to what stock plaintiff owned and which was retransferred to him by defendant as directed by the contract, it only required the transfer of three more shares to put plaintiff into the ownership of one half of all. But the chief value would not be the money value of the three shares, but rather the power and influence it would give plaintiff in the management and direction of the corporation. By becoming owner of one half the stock plaintiff would be enabled to check any proposed management of the company's affairs which he might think was detrimental. And so it appears clear to us that this is not like a case where one should merely seek the compulsory transfer of some shares of stock, which would only have the effect of putting him into possession and ownership of such shares the loss of which might readily be made good by damages in the shape of the money value of such stock. We think, therefore, that the case is exceptional and that plaintiff has no adequate remedy at law.

We have not been able to discover any reason for interfering with the decree of the trial court and hence affirm the judgment.

All concur.

SHUBERT v. WOODWARD.

(United States Circuit Court of Appeals, 1909, 167 Fed. Rep. 47.)

SANBORN, C. J. The complainants pray in their bill, and the orders challenged grant, a temporary injunction against the violation by the defendants of the contract of May 4, 1908. . . .

The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practices of equity jurisprudence. *Hennessey v. Woolworth*, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast, or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience, and by them the judicial discretion of the court must be guided. . . .

The amusement company agreed by the fourth, seventh, eighteenth, and nineteenth paragraphs of the contract that it would supervise and control without charge, and that Woodward should manage for \$50 per week, the Shubert Theater, subject to the orders and directions of the Shuberts, that Woodward would approve the bookings of the theater, and that its funds should be deposited to the credit of the Shuberts' account by a treasurer appointed by them. Neither the amusement company nor the court, however, has the power to efficiently compel Woodward to do any of the things here required to be done by his personal services, because he is not a party to the contract, he has not agreed to do as the contract recites, and because, if he had signed and agreed, the examination and approval of the bookings and the suitable management of the theater are personal acts whose rightful performance requires special knowledge and experience in the business of operating theaters, and the exercise of skill, discretion, and cultivated judgment, and in the end rests wholly in the will of Woodward. Courts of equity have no efficient means, and therefore will not ordinarily attempt, to constrain an individual to perform personal acts which require special knowledge and experience and the exercise of skill, discretion, and cultivated judgment. . . .

Again, the enforcement of the specific performance of the contract in hand will necessarily entail upon the courts through many years the supervision and direction of a continuous series of acts, many of which will present the question whether or not they accord with the contract, such as, what bookings should be approved or dis-

approved, how many and what persons should be employed to operate the theater, how the intricate details of the business of the theater should be conducted, how its operation should be advertised, and many other unforeseen issues which the complicated performance contemplated cannot fail to raise. It is conceded that a court of equity has ample power to determine all these questions and to conduct this business by its receiver, or master, and that it will sometimes enforce the performance of contracts where the performance involves more intricate details, or longer periods of time, where the other equities of the complainant in the case, or the public interest, are controlling. But in the absence of such public interest, or such controlling equities, or of clear evidence that irreparable injury will probably result to the complainant if it withholds the relief sought, a court of equity does not constrain, and it ought not to compel, the enforcement of the specific performance of a contract which cannot be consummated by a speedy, final decree, but which involves the supervision of a continuous series of acts which must extend through a long period of time and which will require the exercise of special knowledge, judgment, and experience. The brevity of time and the duty of the court to other litigants praying the determination of their suits ordinarily forbid a court to assume unnecessarily so burdensome a task.

POWELL v. SANTA FE R. R.

(Supreme Court of Missouri, 1908, 215 Mo. 339, 114 S. W. 1067.)

VALLIANT, P. J. . . . "After findings on the issues submitted to the jury had been reported, the court entered the following finding and judgment: . . .

"In our opinion this case should be determined with respect to plaintiff's equity arising from the fact that when the railroad was first built, a subway was left for his use and he constructed his barns and fences with reference to that way. It appears that he has two barns immediately north of the track and an inclosure around them where he feeds his stock. Some three hundred feet away and on the south side of the track is the spring to which the stock go from the lots about the barns to get water. To use a grade crossing,

plaintiff will be compelled to reconstruct his fences and barns or pay ten dollars a month to a hand to watch his cattle as they go through the gates and over the grade crossing to get water. This will render his farming operations more irksome and expensive and his farm less valuable. There is some testimony that he might dig a pond on the north side of the railroad; but this testimony is accompanied by the statement of the witness that the pond would soon be filled with mud. It is apparent to any one that serious inconvenience and considerable loss will be thrown on the plaintiff if he is forced to do without the undergrade way. No testimony is before us by which we can compare the expense he would be put to in changing his present arrangements with the expense of the defendant in making an arched passage through the embankment. The railway company chose not to prove what the cost of the underground passage would be, though it was easy to prove. We are, therefore, left to our own judgment about the matter, which is that the expense of constructing an arch would be much less in the long run than the expense to the plaintiff in using the grade crossing, to say nothing of the inconvenience of doing so. Now, the company's having left a subway for the plaintiff from the first, and permitted him to use it for ten or twelve years and arrange his barns and fences with reference to it, gives him a clear equity to have the continued use of it, unless the damage to the defendant will be out of proportion to the benefit to him. The testimony of defendant's witness Saunders explodes the theory that a subway will be detrimental to defendant's property or dangerous to its employees or the public. We think the cost of building it will not be inordinate. . . .

The right that a farmer has to the establishing of a crossing where a railroad divides his land, is given by statute and the statute itself seems to come naturally in response to a demand of right and justice. The statute is, to a considerable extent, general in its terms, leaving many details to be adjusted according to the particular situation and circumstances of the particular case, and this adjustment must be made by the court according to the dictates of an intelligent sense of justice, regarding the rights and duties both of the railroad company and those also of the landowner. The statute has given to neither the one nor the other the right to dictate the location or manner of construction; therefore, when the parties cannot agree, the court must exercise its best judgment and decide the controversy with due

regard to the rights of both. We think that the opinion above-herein copied shows that the Court of Appeals understood and appreciated the situation and correctly applied the law to the facts of the case; therefore, we adopt that opinion as the opinion of this court. . . .

HARPER v. VIRGINIAN RY. CO.

(Supreme Court of Appeals of West Virginia, 1915, 76 W. Va. 788; 86 S. E. 919.)

MILLER, J. The covenant in plaintiff's contract of September 20, 1902, and in their deed of February 23, 1903, a part of the consideration for their grant of a right of way and depot grounds to the Deepwater Railway Company, defendant's predecessor in title, and specific execution of which is sought by the bill, is as follows: "It is further agreed that said Railway Company is to erect on the land of the parties of the first part, a depot, for the general accommodation of the public. The said depot is to be built and operated within one year from the completion of said R. R." . . .

(1) The first proposition, that a court of equity will not decree specific performance of such a contract, is not one of general application. A correct statement of the rule, according to reason, and the great weight of authority is, that such contracts are not void per se and will be specifically enforced, unless to do so would be to subordinate public to private interests, or would so hamper the railway company that it would not properly discharge its duties to the public in general. . . .

(2) It is true that specific performance is not always a matter of right, and rests in the sound, not arbitrary discretion of the court; but specific performance will not be withheld when no hardship or injustice will result, and where an action at law for damages will not be adequate. We do not think the case presented here can be relievable at law as completely and adequately as by specific performance. How could the plaintiff's damages be measured? Not only is valuable property involved, but the service of the railway company to the public in general, and to plaintiffs in particular, and for an

indefinite time, not inconsistent with the public interests, is also involved. How could damages of this character be adequately measured in a court of law? Our decisions say, generally, that the remedy at law must be as adequate and complete as in equity in order to deprive one of equitable relief. . . .

We are of opinion that the decree should be so modified as to continue the same in force so long and so long only as consistently with defendant's duties to the public in general, and compliance therewith shall not have become unduly burdensome and unjust, and the defendant may reasonably be required to maintain and operate the depot at Harper, and that when in accordance with these principles it can no longer reasonably be required to continue the maintenance and operation of said depot, the coercive power of the court may be withdrawn and the parties left to the pursuit of such legal remedies as they may then have. . . .

As so modified we are of opinion, therefore, to affirm the decree.

WESTERN WAGON AND PROPERTY CO. v. WEST.

(Supreme Court of Judicature (1892) 1 Chancery Division, 271.)

CHITTY, J. . . . The Plaintiffs are the assignees for value of the benefit of a contract to make a loan of money at interest upon security. Having given notice of their assignment, they claim to recover from the defendants the £500 which the defendants lent and paid to Pinfold under the contract. . . . A Court of Equity will not decree specific performance of a contract to make or take a loan of money, whether the loan is to be on security or not. This was decided by Sir John Romilly in *Rogers v. Challis* (1), and *Sichel v. Mosenthal* (2), and these decisions were approved of by the Privy Council in *Larios v. Bonany y Gurety* (3). In other words, a Court of Equity will not compel the intended lender to make, or the intended borrower to take the loan, but will leave the parties to such a contract to their remedies by action at common law for damages. It

(1) 27 Beav. 175.

(2) 30 Beav 371.

(3) L. R. 5 P. C. 346.

follows, then, that Pinfold could not have maintained a suit in equity against the defendants to compel them to lend the £500, and that, inasmuch as the plaintiff's as assigns of Pinfold, are in no better position than Pinfold himself, the plaintiffs cannot maintain such a suit.

STROHMAIER v. ZEPPENFELD.

(Missouri Court of Appeals, 1877, 3 Mo. App. 429.)

HAYDEN, J. This is a bill in the nature of a bill in equity, asking that the defendant may be compelled to execute a renewal of a lease. A former owner of the leased lot had leased it to the respondent for a term of ten years, and in the lease was the following covenant: "And it is covenanted and agreed by and between the said parties that, at the end of the term hereby demised, this lease shall be renewable for the further term of ten years, provided that the party of the second part giving [give] to the party of the first part notice in writing of his or their wish to renew the same, three months at least before the end of the term. And the lease so renewed shall contain all the covenants, agreements, clauses, and stipulations herein contained, with this exception only: The annual rents to be reserved on the renewal shall be six per centum upon the value of the demised premises, exclusive only of the improvements thereon placed by said lessee, or his legal representatives, if any, which value shall be estimated by two disinterested freeholders of the city of St. Louis, one of whom shall be selected by the party of the first part and the other by the party of the second part," etc. . . .

It is well settled that a court of equity will not specifically enforce a contract for arbitration. Where arbitrators are to act, the court will neither compel their appointment, nor, when they are appointed, will the court compel them to act. *Agar v. Macklew*, 2 Sim. & Stu. 418; *Milnes v. Gery*, 14 Ves. Jr. 400; *Story's Eq. Jur.*, sec. 1457. But where, as in the present case, the parties have by a written contract definitely agreed upon all the substantial terms, equity will not permit one of them to set up his own wrong as a defense to the non-performance of the contract, and thereby to keep possession of the

property which the first party has laid out in the expectation that the contract would be performed. In such a case, when the defendant refuses to comply with his contract, he subjects himself to the operation of those remedies which courts of equity afford. Having broken the contract himself, it does not lie in his mouth to say the contract cannot be performed because it provides that one element in ascertaining the rent is a valuation by persons to be selected by the parties. The answer to this is that, as the owner of the ground refuses to perform the contract precisely as made, and thereby works a wrong to the lessee, for which the latter has no adequate legal remedy, a court of equity, to prevent a failure of justice, applies its own remedy to the breach of contract. In such cases a court of equity does not proceed upon the basis of enforcing the contract exactly as made by the parties, but upon the theory that, while in all important respects the contract can be specifically performed as the parties made it, in some minor matter where, through the wrong of the party resisting, it cannot be exactly enforced, equity, in pursuance of its principle of substituting compensation for performance, where it is necessary in order to attain the ends of substantial justice, will apply its own remedies to the wrong, and thus secure that which, in essentials, is a performance. The real difficulty lies in deciding what contracts are so uncertain that equity will not apply this rule of compensation to them. On the one hand, equity cannot make contracts for the parties; on the other, it will not let the defendant escape the consequences of his obligation where only some insignificant detail is in doubt. While the rule itself is admitted, there is a conflict, in the older authorities, as to what terms are of the essence of a contract. . . . In *Hall v. Warren*, 9 Ves. Jr. 605, where the valuation was to be by appraisers appointed by the parties, the master of the rolls, Sir William Grant, said: "Nothing appears in the acts to be done so purely personal that they cannot be supplied without the intervention of the mind and the act of the party; for they are to be done with reference to a given mode; and, with regard to ascertaining the value, a mode equivalent and as effectual and fair may be found." Whatever may be said as to the older cases, this appears to be an accurate expression of the principle upon which the more recent cases have proceeded. In *Judson v. Judson*, 19 Eng. Law & Eq. 547, where the contract provided that each party should appoint a valuer, and the valuers appointed could not agree, and the vendor

then refused to join in any scheme for a valuation, the court decreed specific performance. The vice-chancellor said: "The sixth condition stated that the purchaser should take the property at a valuation, the essence of the stipulation not appearing to be the mode in which the valuation was to be made." *Dunnell v. Ketaltas*, 16 Abb. Pr. 205; *Kelso v. Kelly*, 1 Daly, 419, where the authorities are reviewed with much care. It seems clearly the doctrine of the later cases that equity will, to prevent a failure of justice, apply its own remedies, and thus, where the substantial terms of a contract are agreed upon, arrive approximately at the minor details and then specifically enforce the contract. *Parker v. Taswell*, 2 De G. & J. 559; *Norris v. Jackson*, 3 Gif. 396; *Backus' Appeal*, 58 Pa. St. 186, 193. This rule has an *a-fortiori* application where there is a part performance, or where the party seeking to enforce the contract has laid out money or property in the faith that the other party will keep his covenants.

It would be peculiarly hard if relief should be denied to the plaintiff in the present case. Since the decision of the Supreme Court of this state in the case of *Arnot v. Alexander*, 44 Mo. 25, persons taking leases with covenants similar to that in the present lease have had, in some sort, a right to expect that courts of equity in this state will enforce them. The clause drawn in question in that case is not, indeed, precisely similar to the one here in dispute. But the court argued from the certainty of a covenant of the present kind to the covenant there in question. Stating it as an established proposition that a court of equity would hear evidence and fix the amount of the rent, in a case where the amount for the renewal term is left to be determined by the valuation of third parties, the Supreme Court, passing over the later cases from *Vesey, Jr.*, presented to its consideration, sanctioned the doctrine of Sir William Grant in *Hall v. Warren*, which has been quoted above. Wherever a rule is laid down which may operate as a rule of property, the courts ought not to depart from that rule without very strong reasons. It is believed that there are many leases with covenants similar to that contained in the present.

The cases of *Biddle v. Ramsey*, 52 Mo. 153, and *Hug v. Van Burkleo*, 58 Mo. 202, are not in conflict with the recent cases which we have cited. As has been shown, a court of equity does not enforce the contract as made by the parties, in such cases as the present. On the contrary, equity proceeds upon the basis that the contract,

as made, cannot be enforced, and applies its own remedies to the violation of its rules. The relief given is of a purely equitable nature, and the ground on which the plaintiff is entitled to it is that, while he has a clear right of action, he has no adequate remedy at law. In the case of a covenant like that now in question, it is obvious that it is not of the essence of the contract that the valuation should be made by "disinterested freeholders" rather than by a court of equity. That is an immaterial detail, and a mode as effectual and fair may be found. Accordingly, the court should hear evidence, and upon the case as made, and upon the facts as ascertained from the evidence, specific performance may be decreed.

SECTION III. NEGATIVE CONTRACTS.

GUARD v. WHITESIDE.

(Supreme Court of Illinois, 1851, 13 Ill. 7.)

This was an action of debt brought in the Circuit Court of Hardin County, upon an injunction bond. The appellants filed a plea in bar, stating that on the 10th day of April, 1851, it was agreed between the parties to the suit that if the appellants would give the appellee a horse worth seventy-five dollars he would not bring suit on the bond until the 25th of December, 1851; that the horse was delivered in pursuance of this agreement. To which plea there was a demurrer, which was sustained. . . .

TREAT, C. J. The defendants pleaded in bar of the action, that, before the commencement thereof, the plaintiff agreed with one of them to forbear the collection of the bond until the 25th of December, 1851, if said defendant would pay and deliver a certain horse at the price of \$75, which horse was then delivered. The agreement relied on in the plea must be considered as an undertaking by the plaintiff not to sue on the obligation within a specified time. A covenant never to sue is regarded as an absolute release. It is so held to avoid circuity of action; for if the covenantor should be permitted

to sue in violation of his covenant and recover, the other party, in an action for a breach of the covenant, would recover precisely the same damages. But a covenant not to sue within a limited time cannot be pleaded in bar of an action brought before the time has expired (*Evans v. Lohr*, 2 Scam. R., 511; *Payne v. Weible*, 30 Ill. R., 166; as part failure of consideration, *Hill v. Enders*, 19 Ill. 165; *Morgan v. Fallenstein*, 27 Ill. R., 32; *Parmelee v. Lawrence*, 44 Ill. R., 405). The remedy of the party is a direct action on the covenant. The law on this subject is too well established to admit of a doubt or discussion. It is only necessary to refer to some of the principal authorities. *Thimbleby v. Barron*, 3 Mees. & Wels, 210; *Winans v. Huston*, 6 Wend. 471; *Perkins v. Gilman*, 8 Pick. 229; *Walker v. McCulloch*, 4 Greenl. 421; *Ward v. Johns*, 6 Munf. 6; *Lane v. Owings*, 3 Bibb, 247. There is a very satisfactory reason why a plea in bar of the action should not be sustained. A judgment for the defendant, on such a plea, would forever conclude the plaintiff from bringing another action. There would seem to be a propriety in allowing a defendant to set up the covenant as a defense to the further maintenance of an action brought in violation thereof—such a defense as would defeat the particular action, without concluding the plaintiff from bringing another after the time limited had expired. But we must be understood as expressing no opinion upon the question, whether the rules of the law will tolerate a defense of this character.

The judgment is affirmed.

JACKSON v. BYRNES.

(Supreme Court of Tennessee, 1899, 103 Tenn. (19 Pickle) 698, 54 S. W. 984.)

WILKES, J. Jackson sold to Byrnes a livery stable and outfit for \$1,500, situated in the town of Cedar Hill, Robertson County. The purchaser insists that as a part consideration for the contract, Jackson agreed that he would not engage in the same business at that place so long as he, the purchaser, continued in the business.

The contention is that he breached this agreement by letting horses and wagons to hire. The plaintiff sued for this breach, and there was a trial before the court and a jury, and a verdict and judgment for \$400, and defendant has appealed and assigned errors.

As the first assignment of error, it is said that such contract is contrary to public policy, and should not be enforced.

In this connection it is said there is a variance between the allegation in the declaration and the evidence; that the declaration alleges that the defendant was obligated not to enter into the business at Cedar Hill, while the evidence was to the effect that he would not enter into the business anywhere. We think this contention not well made, and taking the evidence as a whole, it clearly appears that Cedar Hill was the place of the location of the business, and that the contract did not relate to doing business anywhere else. We do not think such an agreement is so opposed to public policy as to be void. Such contracts have been upheld and enforced by the courts. *Beach on Modern Law of Contracts*, Vol. 2, Sec. 1569; *Clark on Contract*, pages 448, 449.

It is well to remark in this connection that the case is not simply one of a sale of good will. A sale merely of good will does not, of itself, imply a contract on the part of the vendor to not engage again in a similar business.

Lord Eldon defined "good will" as simply a possibility that the old customers would resort to the old place. But this definition is, perhaps, too restricted. *Slack v. Suddoth*, 102 Tenn. 375.

Suffice it to say that an obligation not to enter into a similar business will not be implied from a mere sale and transfer of good will, and the present is not such a case, but one where there was an express parol agreement collateral with the conveyance of the property, but not embodied in it, not to enter into competition in the same business and territory as the plaintiff did business in so long as he continued in it.

The next assignment is as to the measure of damages. The court charged the jury that the proper measure was the difference in value of the property with the good will and without competition of the defendant, and the value of the property without the good will and with the competition of the defendant. In the same connection the trial Judge instructed the jury that they must look to the evidence and see if there was any competition, and its character and extent, whether full or slight, and the extent to which the property was depreciated from the purchase price as agreed on and as shown by the proof, as the damages plaintiff would be entitled to recover. We do not understand the trial judge to mean that a single act of com-

petition would be a breach of the contract, and he did not intend to lay down two rules, but only to instruct the jury as to how they should arrive at the difference in value with and without the competition. But it is said the rule itself is erroneous, and that the proper rule is that the plaintiff can only recover such actual damages and loss as he may be able to show up to the bringing of the suit. Authorities are cited upon both theories. . . .

The court is of opinion that in a case like the present, and under the facts, the plaintiff's proper remedy is to enjoin the defendant from engaging in the competitive business contrary to the agreement.

This would, so far as results go, be to specifically enforce the contract. If, however, the plaintiff resort to an action for damages for a breach, only such actual damages as have been sustained up to the bringing of the suit should be recovered. If the competition is continued, injunction may also be resorted to.

It is practically impossible to determine the difference in value of the property or contract with and without the proviso against competition. No witness could know, and the plaintiff himself could not state how long he would continue in business, and, in the absence of this fact, there could be no tangible basis for an estimate of damages.

No sum is fixed in this case as liquidated damages, and there is no allegation that any specific amount was given for this prohibition, but the statement is simply to the effect that it was a part of the consideration.

For these reasons we are of opinion there is error in the judgment of the court below, and it is reversed and the cause remanded. Appellee will pay costs of appeal.

PEABODY v. NORFOLK.

(Supreme Court of Massachusetts, 1868, 98 Mass. 452.)

GRAY, J. It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as

property. If he adopts and publicly uses a trade-mark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission. If he makes a new and useful invention of any machine or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it, and thus affording to all persons the means of ultimately availing themselves of it, obtain letters patent from the government securing to him its exclusive use and profit for a term of years. If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.

In the earliest reported case of this class, Lord Eldon indeed refused to grant an injunction against imparting, in violation of an agreement, the secret, not only of a patent which had been obtained and had expired, and which the whole public was therefore entitled to use; but also that of making a certain kind of pills, for which no patent had been procured; and stated, as a reason for the latter, that, if the art and method of preparing them was a secret, the court could not, without having it disclosed, ascertain whether it had been infringed. *Newberry v. James*, 2 Meriv. 446. But the same learned chancellor afterwards considered the general question as still an open one, whether a court of equity would restrain a party from divulging a secret in medicine, which was not protected by patent, but which he had promised to keep; and in such a case dissolved an injunction of the vice-chancellor, upon the sole ground that the defendant made affidavit that the secret was not derived from the plaintiff. *Williams v. Williams*, 3 Meriv. 157. And in a later case he unhesitatingly granted an injunction against one who by the terms of his agreement with the plaintiff was not to be instructed in the secret, and who had obtained a knowledge of it by a breach of trust. *Yovatt v. Winyard*, 1 Jac. & Walk. 394.

Sir John Leach decreed, in one case, specific performance of an agreement by a trader to sell the good will of a business and the exclusive use of a secret in dyeing; and, in another, an account of the profits of a secret for making a medicine against a son of the inventor, holding it in trust for his brothers and sisters. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Green v. Folgham*, Ib. 398.

In a more recent case, *Morison*, the inventor and sole proprietor of a medicine, for which no patent had been obtained, entered into partnership with *Moat*, to whom he communicated the secret of making the medicine, but did not make the secret a part of the assets of the partnership, and reserved it to himself as against all other persons, and *Moat* covenanted not to reveal it to any person whomsoever; by subsequent agreement *Morison's* sons and a son of *Moat* were admitted as partners in the business; and the secret was surreptitiously obtained from *Moat* by his son. After the death of both the original parties, on a bill brought by *Morison's* sons, who were also legatees of the secret, against *Moat's* son, Vice-Chancellor *Turner*, in an elaborate judgment reviewing all the English authorities, granted an injunction restraining the defendant from using the secret in any manner in compounding the medicine; and refused to restrain him from communicating the secret, simply for want of any allegation or evidence of an intention to communicate it. *Morison v. Moat*, 9 Hare, 241. The defendant appealed; but the order was affirmed; and Lord *Cranworth*, delivering the opinion of the court of appeal, said: "The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever, that when a party who has a secret in trade employs persons under a contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer." 21 L. J. (N. S.) Ch. 248. . . .

The contract between *Peabody* and *Norfolk* was, on the part of *Norfolk*, to serve *Peabody* as engineer in his jute factory so far as required, and particularly in the construction and running of the machinery, and not to give any third person information directly or indirectly in regard to any portion of the machinery, but to "consider all of said machinery as sacred to be used only for the benefit of said *Peabody* or his assigns, and by all means in his power prevent other persons from obtaining any information in regard to it such

as would enable them to use it;" and, on the part of Peabody, to pay Norfolk an annual salary "in full compensation for the above described services," provided he should render his services acceptable to Peabody as he had theretofore, and Peabody or his assigns should continue the business of manufacturing jute goods. The "above described services" clearly include, not only the affirmative promise to serve as an engineer, but the negative promise not to disclose the secret, and to do his best to conceal it; and the salary is a legal and sufficient consideration for all the agreements of Norfolk.

The plaintiffs do not ask for specific performance of Norfolk's promise to serve as engineer. It is therefore unnecessary to consider whether that promise is limited in point of time or determinable at pleasure, or is capable of being specifically enforced. Whatever may be the limit or effect of his obligation to serve, he is bound by his contract never to disclose the secret confidentially imparted to him during the term of his actual service. And this part of his agreement may be specifically enforced in equity, even if the other part could not. *Lumley v. Wagner*, 1 De Gex, Macn. & Gord. 604.

The bill alleges that the invention and the process of manufacture have been kept secret, and that the secret is the property of the original plaintiff and of great value to him, and was confidentially imparted to Norfolk; and on demurrer these allegations must be taken to be true. Although the process is carried on in a large factory, the workmen may not understand or be intrusted with the secret, or may have acquired a knowledge of it upon the like confidence. A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. Even if, as is argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer, the owner is not the less entitled to protection against those who in, or with knowledge of violation of contract and breach of confidence, undertake to disclose it or to reap the benefit of it. The danger of divulging the secret in the course of a judicial investigation affords in our opinion no satisfactory reason why a court of equity should refuse all remedy against the wrongdoers.

The supplemental bill alleges, and the demurrer admits, that Cook, with notice of the relations between Peabody and Norfolk, has made arrangements to have the secret communicated to him by Norfolk,

and together with him to use it for their own benefit. Upon such a state of facts, Cook has no better equity than Norfolk.

The executors of the will of the original plaintiff succeed to his rights, and appear on the allegations of the bills to be entitled to the relief prayed for. *Morison v. Moat*, above cited.

Demurrer overruled.

DALY v. SMITH

(New York Superior Court, 1874, 38 N. Y. Sup. Ct. Rep. 158.)

FREEDMAN, J. This is a motion on the part of the plaintiff for the continuance, during the pendency of the action, of an injunction, heretofore granted, preliminarily restraining the defendant, Fanny Morant Smith, from performing as an actress upon the stage of the Union Square Theater.

The papers on which the motion is based show, among other things, that on February 11, 1874, a contract in writing was entered into between the plaintiff and Fanny Morant Smith, by which the latter covenanted and agreed, among other things, to act, to the best of her ability, in theatrical performances, on the stage of plaintiff's theater, during the seasons of 1874, 1875, and 1876, all such parts and characters as the plaintiff might direct, and that she would not act at any other theater or place in the city of New York, from the day of the date of said contract until the determination thereof, without the written consent of the plaintiff. The plaintiff then avers a breach of said contract on her part, by accepting an engagement to play during the ensuing season of the Union Square Theater, and allowing her appearance at that place to be publicly advertised, and after setting forth various alleged equities, which it is claimed, on his part, entitled him to an injunction, and which will be noticed hereafter, he prays that she may be enjoined from continuing the breach. The sole object of the action, in which her husband has been joined as a party defendant, is to have her thus restrained by the decree of this court, and it is clear, therefore, that unless an action for that purpose alone can be maintained, the court is without jurisdiction to restrain her during the pendency thereof.

The very first question to be considered, therefore, is whether the action will lie as brought. It is conceded, by both sides, that the action could not be maintained for the strict performance of the whole contract, if it had been brought in that form, that in such case there would be no power in the court to compel, either by order or final decree, the defendant to act.

The question, whether or not a court of equity will interfere by injunction to prevent a breach of a contract for personal services, or whether the complainant must look to his damages at law as his sole redress, has been frequently, and on several occasions quite elaborately, discussed both in England and in this country. On a cursory reading the authorities may seem somewhat conflicting, but a careful perusal of them in the light of the facts before the court on the several occasions, can leave no doubt as to the existence of the power. . . .

In the still later case of *Lumley v. Wagner* (1 De Gex, MacN. & G. Ch. 604), decided in 1852, in which the plaintiff prayed that the defendant Johanna Wagner, who had contracted to sing and perform at his theater, and not to use her talents at any other, might be restrained from signing or performing at another theater in violation of her contract. The Lord Chancellor re-examined the jurisdictional question involved at great length, upon both principle and authority, discussing and reviewing many cases, and he concluded by saying that he wished it to be distinctly understood that he entertained no doubt whatever, that the point of law had been properly decided in the court below, where the jurisdiction had been assumed and exercised. He also entered into a minute examination of the facts of the case, and upheld the injunction on the merits as well as on the point of law raised. In the course of his remarks, he expressly overruled *Kemble v. Kean*, and *Kimberly v. Jennings*.

The criticism of *Lumley v. Wagner*, in which Lord Selborne, L. C., indulged in *Wolverhampton & Walsall Railway Co. v. London & Northwestern R. R. Co.* (decided in 1873, and reported in 16 L. R. Equity Cases, 433), is not an indication that the existence of the power contended for will ever be questioned by the courts of England, hereafter. In that case, the complainants sought by means of an injunction to indirectly compel the defendant to use a certain railway line as they had agreed. The defendants insisted that as the bill sought to restrain the breach of a particular clause of an agreement of which as a whole, the court will not enforce specific performance, and there

being no negative stipulation in the agreement, capable of being isolated, so as to form a distinct contract, as in *Lumley v. Wagner*, the court could not interfere, but should leave the parties to their remedy at law. It was in reply to this claim which involved a concession of the existence of the jurisdiction in case of the presence of a negative clause, that Lord Selborne, assuming that in *Lumley v. Wagner*, the Lord Chancellor had placed his decision solely upon the presence of the negative clause, made the remark that in that case the jurisdiction of the court had been enlarged on a highly artificial and technical ground, and that it was the safer and the better rule to look in all such cases to the substance and not to the form. "If," said he, "the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the court to come to for a remedy. If it is, I can not think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative. "Acting upon the rule thus laid down, and coming to the conclusion that the complainants had a substantial equity, Lord Selborne assumed jurisdiction, though there was no negative clause, and overruled defendants demurrer to the complaint. . . .

The authorities so far considered show conclusively that in England, at least, the jurisdiction of courts of equity over suits like the one at bar, is now too firmly established to be again shaken. Nor has such jurisdiction been seriously questioned in this State. . . .

And in the recent case of *DePol v. Sohlke* (7 Rob. 280), Mr. Justice Jones assumed throughout that the right to issue an injunction to prevent the breach of a covenant to render personal services, on the ground that the performance of the act would produce irreparable damages, could not well be questioned. But he denied the motion for an injunction on the ground that the plaintiffs did not then have, and were not likely to have for some time to come, an establishment in active operation, that, therefore, no custom could, for the time being, be withdrawn from them, and that consequently, no damages were resulting, or could be anticipated to result, for some time to come, from the act which plaintiffs sought to enjoin.

So, upon principle, can I conceive of no reason why contracts for theatrical performances should stand upon a different footing than

other contracts involving the exercise of intellectual faculties; why actors and actresses should by the law of contracts, be treated as a specially privileged class, or why theatrical managers who have to rely upon their contracts with performers of attractive talents to carry on the business of their theaters, should, with the large capital necessarily involved in their business, be left completely at the mercy of their performers. On the contrary, I am of the opinion that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that whenever the court has not proper jurisdiction to enforce the whole engagement, it should, like in all other cases, operate to bind their consciences, at least as far as they can be bound, to a true and faithful performance. As pointed out by Judge J. F. Daly, in *Hayes v. Willio* (11 Abb. Pr. N. S. 167), and his remarks upon this point are entitled to respect, notwithstanding the fact that his decision has been reversed upon another point, the resort to actions at law for damages for a sudden desertion of the performers in the middle of their season, will, in most cases fail to afford adequate compensation; and it is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him irreparable injury. If, therefore, such a manager comes to a court of equity and makes proof of these facts and circumstances, showing, also, that the contract upon which he relies is a reasonable one, that he is in no wise to blame for its breach by the defendant, and that he has no adequate remedy at law, upon what principle of justice or of common sense is he to be told that he must, nevertheless, seek his remedy at law, and take the chance by proving his damages by legal evidence before a jury. Of what benefit would even a verdict be to him in case the defendant is wholly insolvent? Is it not an old and fairly settled principle of equity jurisprudence, that just because there is in such a case no adequate remedy at law, it is the office and the duty of equity to step in to prevent a failure of justice? In the language of Lord Chancellor St. Leonards, a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

Suffice it, therefore, to say, that upon principle as well as upon authority, I am fully persuaded that this court does possess the power

and jurisdiction which has been invoked by the plaintiff. At the same time, I am well aware that there is no branch of equitable jurisdiction which requires more discretion in the exercise of it, than the one that has been here considered. It remains, therefore, to be seen whether the plaintiff shall have the benefit of it on the merits of his case.

The plaintiff shows that the defendant, Fanny Morant Smith, is a distinguished actress and a great artistic acquisition, both in name and dramatic service, to any theater; that, therefore, for several seasons past he considered it important to secure her professional services for his theater, and did secure them, that the last contract for such seasons expired in the month of June last; that before the expiration of that contract, to wit, on the 11th of February last, the new contract was entered into under which the present controversy has arisen; that the last named contract covers the seasons of 1874, 1875 and 1876, each season to commence on or about September 1 of each respective year, and to terminate on or about June 15 of the following year, and that by it Fanny Morant Smith, in consideration of a weekly salary of one hundred and thirty dollars, to be paid to her during the first season, and a like salary of one hundred and thirty-five dollars to be paid to her during the second and third seasons, payment to be made on Monday, at noon, of each week, bound herself to act, to the best of her ability, in the performances to be given during the said seasons, all such parts and characters as the plaintiff might direct, and to conform to and faithfully obey certain rules of plaintiff's theater, referred to in, and made part of said contract, and not to act at any other theater in the city of New York, from the date of said contract until the determination thereof, without the written consent of the plaintiff. The contract also shows that each week is to include such rehearsals as may be ordered by the plaintiff, without any extra payment therefor. The plaintiff further shows that he made such contract, as the defendant Fanny Morant Smith well understood at the time, because of his desire, first to secure her dramatic service, secondly her name, and thirdly to prevent her acting elsewhere in New York without his permission, and obtaining *eclat* for a rival theater; that the latter is always an essential reason with managers, and is well understood by every actor and actress, as it was understood by the defendant; that relying on said contract, he announced her in all the daily papers in the city of New York, and widely throughout the United States, as a

member of his company for this year's season, to commence August 25; that a rehearsal for the performance to be given on that day was ordered for Saturday, August 15, that she was notified to attend the same, but that she refused; that he has substantially selected and prepared those plays which are to be presented up to the close of the said season, and in doing so has relied on her services, and has managerially distributed and prepared many parts for her to perform therein; but that in violation of her contract and against plaintiff's express prohibition, she entered into an engagement to play during the ensuing season at the Union Square Theater, a rival to plaintiff's theater, and that with her consent she is publicly announced to appear there. And finally the plaintiff shows that it will be impossible to replace her by any other artist at this date, inasmuch as engagements are made in the spring; that he will therefore be irreparably damaged and injured in his business, not only by her departure, but also by her appearance and performance at the rival establishment and that a computation of the damage thus resulting to him in loss of receipts and otherwise will be utterly impossible in an action at law.

None of these allegations have been denied, or attempted to be denied, by the defendant, Fanny Morant Smith, except the allegation that the plaintiff has selected parts for her, and in respect to that, she only avers generally, that she has no knowledge, and does not believe the fact to be as stated by the plaintiff, which can not be held to amount to a denial, especially as she admits to have been summoned to a rehearsal, and to have refused not only to attend, but even to look at the *rôle* assigned to her. Nor has the force of any of the said allegations of the plaintiff been weakened by any allegation on her part, unless it be by the allegations that she notified the plaintiff, some time after the execution of the contract, of her intention and desire to cancel the same, and that she is pecuniarily able, to the extent of twenty thousand dollars, in real estate, to respond in any damages he may recover against her at law. Upon the whole case, as made by the plaintiff, the facts thus averred by her, even if true, are quite unimportant. So, when the contract is scrutinized in its entirety, and with due regard to its nature and the situation, and the prior dealings of the parties, nothing can be found in it which could be construed into a hardship upon her. Even the fact that the prohibition runs from the date of the contract, and not from the commencement of the

regular season of 1874-1875, is not an unreasonable circumstance in this case, however unreasonable and inequitable it might be in others. It has been conceded by both sides, that the defendant, Fanny Morant Smith, is not only a great actress, but that she is also a shrewd lady of great business capacity, and mature age and judgment, and it is therefore safe to assume that, in the light of her past experience with the plaintiff, she made the best bargain for herself that could be got under the circumstances. Nor does she claim that the contract is void on grounds of public policy, as being in restraint of trade. On the contrary, the learned counsel who represents her, admits that such is not the fact.

The plaintiff has, therefore, made a case as strong as *Lumley v. Wagner*, in all respects, and in some respects even stronger, and he is entitled to his injunction, unless the defendant, Fanny Morant Smith, establishes an affirmative defense. . . .

Upon full consideration of all the questions arising in this case, as presented by the affidavits of the parties, I am entirely satisfied, not only, that the plaintiff has made out a case which calls strongly for the interposition of the equity powers of this court, but also that the defendant, Fanny Morant Smith has no defense on the merits. This brings me to the last question involved. The parties evidently foresaw that differences might arise between them during the life of the contract, and so careful were they, that they provided even for the contingency which has arisen in this case. The contract says, that if the defendant, Fanny Morant Smith, should refuse to fulfill her part, and should attempt to perform at any other theater before the termination of her agreement with the plaintiff, the plaintiff may by legal process or otherwise, restrain her from so performing, on payment to her during such restraint of a sum equal to one-quarter of the salary to be paid to her under the contract in lieu of the said, or any other, salary under the agreement during the period covered. I refrained from noticing this clause at an earlier stage, because parties can not confer jurisdiction by stipulation. But as the jurisdiction exists, as I have already shown, wholly irrespective of the clause, it was competent for the parties to agree upon the terms of restraint in a proper case, and as this is a proper case for an injunction, irrespective of said clause, I have no inclination to interfere with the arrangement which the parties saw fit to make. The plaintiff evidently considered that, though in case of disagreement, he could not compel the defendant,

Fanny Morant Smith to act, it was worth about thirty-three dollars a week to him to keep her from constituting an attraction for a rival establishment, and she, having agreed to it, has no cause of complaint, for her restraint is not predicated by the court upon the existence of the clause. By the terms of the contract, restraint and payment are mutually dependent on each other, and the restraint is not to extend beyond the limits of the city of New York, and a contract to this effect is therefore presented, which the court can completely and effectually enforce. No previous payment or tender is necessary to the maintenance of the action.

The motion of the plaintiff for the continuance of the injunction during the pendency of the action, is therefore granted, with ten dollars costs, but on condition that the plaintiff pay to the defendant, Fanny Morant Smith, during such continuance, one-quarter of the salary to which she would be entitled under the contract in case of performance, such payment to be made to her, or her order, as she may direct, in weekly installments, payable on Monday of each week, and that he also pay to her or her order, forthwith, such sum as may have accrued since the granting of the preliminary injunction contained in the order to show cause herein.

KIRCHNER & CO. v. GRUBAN.

(Supreme Court of Judicature, (1901) 1 Ch. Div. 413.)

EVE, J. It is admitted, or conceded, I think I may say, by counsel for the plaintiffs that if this were a mere affirmative agreement by the defendant to serve the plaintiffs until July 1, 1910, and he had refused to continue that service, the Court would not according to the well-settled practice, interfere by an injunction to compel him to render his services to the plaintiffs down to the date at which in the ordinary course the engagement of service would come to an end. But it is urged here that it is not merely an affirmative covenant, but that there is in this document a negative stipulation which the Court, according to the practice, can enforce by restraining the defendant in the terms of the covenant. The negative stipulation is to be found

in clause 7 of the agreement. "Mr. Gruben"—that is the defendant—"agrees under a penalty of 20,000 marks to remain in his position and not to give notice before July 1, 1910."

Now it is said that what he has done is a breach of his agreement not to terminate the service before July 1, 1910, and if the matter were entirely free from authority that would be an argument to which I think I should have had to give very much more weight than I am able to do in the present state of the authorities. The question as to the practice of the Court to enforce affirmative covenants of this sort was dealt with and finally disposed of, at any rate for the present, by the case of *Whitwood Chemical Co. v. Hardman* (1891) 2 Ch. 416, and at a later date the principle upon which that and similar cases had been determined came up for consideration before the late Kekewich J. in the case to which I am about to refer, the case of *Davis v. Foreman* (1894) 3 Ch. 654, 655, 657. There the form of the agreement between the employer and the employed was this: "The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15, each and every month." There was an agreement in the negative by the employer that so long as a certain state of things continued to exist he would not give notice to the employee determining the engagement. Kekewich, J., having heard all that was to be said on behalf of the plaintiff, who in that case was the employee seeking to restrain the employer from acting upon the notice, gave his judgment, in which he arrives at this conclusion, that though in form the stipulation or agreement is negative, in substance it is really affirmative and positive, that an agreement not to give notice to determine his employment is for all practical purposes an agreement to continue the employment, and having come to that conclusion he says: "Having regard to the principle expounded by the Court of Appeal in *Whitwood Chemical Co. v. Hardman* (1891) 2 Ch. 416, and recognized again in the case of *Ryan v. Mutual Tontine Westminster Chambers Association* (1893) 1 Ch. 116, which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words,

give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the Court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley v. Wagner* (1852) 1 D. M. & G. 604, which is not to be extended, to a case of this character."

It seems to me that every word of that judgment is applicable to the present case, and that I should be disregarding an authority which is certainly binding upon me if I were to hold that merely because Mr. Gruban has entered into a contract not to terminate the engagement before July 1, 1910, I could grant an injunction the effect of which would be as against him to order specific performance of an agreement to continue to serve the plaintiffs down to July 1, 1910. So that on the first part of the motion I hold that, apart from all other considerations, the plaintiffs would not be entitled to the order for which they ask. . . .

DOCKSTADER v. REED.

(Supreme Court, Appellate Division, New York, 1907. 121 N. Y. App. Div. 846; 106 N. Y. Supp. 795.)

HOUGHTON, J. The plaintiff is the proprietor of a minstrel troupe, and on the 19th day of March, 1907, the defendant contracted by written agreement with him at a stipulated salary per week to sing and play until the end of the season of 1909. The defendant entered upon his employment and continued until September, 1907, when he abandoned his contract, claiming that his health was such that he could not continue singing and traveling about the country and parading the streets in inclement weather. The record contains an affidavit by his physician that to continue in such work and expose himself to varying climate throughout the country would greatly endanger defendant's

health which is not robust. The part to which defendant was cast in plaintiff's troupe was a bass singer in a quartet, rendering several songs during the performance. The court granted an injunction during the pendency of the action, restraining the defendant from rendering any services to any other person than the plaintiff or giving any theatrical performance in public as an actor.

The contract which the defendant signed is the usual unique one which theatrical managers often demand from actors which they employ, and in it the defendant confessed that the services which he was to render were "special, unique, and extraordinary," and admitted that he could not be replaced, and agreed that in the event of its breach the plaintiff would suffer irreparable injury, which could not be ascertained or estimated in an action at law, and consented that an injunction might be issued against him restraining him from rendering services for any other person. This confession and defendant's own estimate of himself is the only proof in the case that his services were unique and that he could not be replaced. The contract gave the plaintiff the right to discharge the defendant, without recourse, if his services were unsatisfactory, and also the absolute right of discharge, without cause, upon two week's notice; and it is quite improbable that a bass singer in a minstrel quartet cannot be found to take defendant's place. Notwithstanding the agreement of the defendant, we think the facts did not warrant the granting of an injunction. Parties to an agreement cannot contract that courts will exercise their functions against or in favor of themselves. Whether or not a court will so exercise its powers is for the court itself to determine.

While equity will often restrain an actor under contract to perform for one and not to perform for another, or from performing for another during the period of the contract, an application for equitable relief is addressed to the sound discretion of the court, and will not be granted where the party seeking relief is not specifically bound by the contract, so that the obligations are reciprocal and enforceable. *Lawrence v. Dixey*, 119 App. Div. 295, 104 N. Y. Supp. 516. Whether equity will intervene to restrain by injunction the violation of a restrictive covenant in relation to personal services depends in large measure upon whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract. *Stowbridge Lith. Co. v. Crane*, 58 Hun,

611, 12 N. Y. Supp. 898. In *Shubert v. Angeles*, 80 App. Div. 625, 80 N. Y. Supp. 146, an injunction was granted against an actress appearing for a rival house in violation of her contract; but it there appeared that she was engaged by the plaintiff because of her special talent as a mimic of other actresses and actors, and that her part could not be taken by another. The salary agreed to be paid defendant was quite moderate, and indicates that his part was quite ordinary, and manifestly could be easily filled. It is undisputed that he was ill, and that a continuance under the contract with plaintiff would endanger his health and be likely to destroy his voice altogether.

The court below felt constrained to grant the injunction because of the peculiar provision of the agreement. We are of opinion, however, upon all the facts disclosed, that the plaintiff was not entitled to an injunction during the pendency of the action, and that the order should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

SECTION IV. RELIEF FOR AND AGAINST THIRD PERSONS —EQUITABLE SERVITUDES.

DANIELS v. DAVISON.

(High Court of Chancery, 1811, 17 Ves. 433.)

In this case the Lord Chancellor (Eldon) pronounced the following judgment: I have already expressed my opinion, that the Plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him; and, with regard to the subsequent sale by the Defendant Davison to the other Defendant Cole, my notion is, that the Plaintiff has an Equity to have a conveyance of the premises from Cole; upon the ground, that Cole must be considered in Equity as having notice of the Plaintiff's equitable title under the agreement; that Cole was bound to inquire; and therefore, without going into the circumstances, to ascertain, whether he had, or had not, actual notice, he is to be considered as a purchaser of the other Defendant's title,

subject to the equity of the Plaintiff to have the premises conveyed to him at the price, which he had by the agreement stipulated to pay to that Defendant; and that it is competent to the Court to make that arrangement as between Co-defendants.

The Plaintiff, therefore, deducting his costs out of the money he is to pay, must have such conveyance from one or both the Defendants, as the Master shall settle, if they differ; but I can go on farther than to regulate as between the Defendants the payment of that money, which the Plaintiff is to pay.

PEARCE v. BASTABLE.

(Supreme Court of Judicature, 1901, 2 Ch. 122.)

COZENS-HARDY, J. The case is plain. There was a contract, which is in no way impeached, for the sale to the plaintiff of the equity of redemption in certain leasehold property. On this contract a deposit was paid by the purchaser, and the title was accepted by him. Then the vendor became bankrupt, and a delay ensued, which was possibly occasioned by the bankruptcy proceedings. The draft assignment was sent in by the purchaser and approved, and the engrossment was forwarded. There is no dispute about the form of the assignment—it was of the leasehold property subject to the mortgage. The trustee in the vendor's bankruptcy has, to use plain language, the impudence to say that he will disclaim the contract without disclaiming the lease, keep the deposit paid by the purchaser and leave him to take such steps in the bankruptcy as he may think fit to take. That the trustee cannot be allowed to disclaim the contract without disclaiming the lease was plainly shown by the decision of Cave, J., in *Re Kerkham*, 80 L. T. Jour. 322. There, before bankruptcy, a man contracted to sell leasehold property to another who sold his rights under the contract to a third person. The trustee in the bankruptcy of the original vendor purported to disclaim the contract without disclaiming the lease, and the Court held that it was not competent for him to separate the subject-matter of the contract from the contract and keep the property, and that the disclaimer was void. That is precisely this case. The disclaimer which the trustee has purported to make is a nullity. What

is the position of the trustee in such a case? It has been contended on his behalf that the fact of the bankruptcy makes all the difference as regards the liability to specifically perform a contract. In support of that, *Holloway v. York*, 25 W. R. 627, has been referred to. The effect of that decision is correctly stated in *Dart's Vendors and Purchasers*, 6th ed. p. 1126—that is to say, that specific performance cannot be decreed against the trustee in bankruptcy of the purchaser. That decision has no application to a case in which the vendor's trustee in bankruptcy is the defendant. If any authority is needed in support of this finding it is to be found in *Ex parte Rabbidge*, 8 Ch. D. 367, 370, where James, L. J., said: "The result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to whom the property belonged." And Cotton, L. J., said: "The trustee in the bankruptcy . . . has vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase-money had not been paid. But he took the legal estate in the property, subject to the equity of the purchaser under the contract, which gave the purchaser the right to say, Convey me the estate on my paying the purchase-money." Anything more explicit on this part of the case could not well be imagined. All that the plaintiff asks the trustee to do is to execute the engrossment already approved and assign the property to him, and, the plaintiff disclaiming any right of proof against the bankrupt's estate, an order for such execution, and that the defendant is to pay the costs of the action, must be made. . . .

GUPTON v. GUPTON.

(Supreme Court of Missouri, 1870, 47 Mo. 37.)

Bliss, Judge, delivered the opinion of the court.

This is a petition for the specific performance, or for compensation for its breach, of a contract to make a will in favor of plaintiff. The plaintiff, Mrs. Gupton, is a daughter, by a former marriage, of Celia

Barnett, wife of Morgan L. Barnett, both defendants; and the petition alleges that said Morgan L. Barnett, being himself childless, seventy-three years of age, and very infirm, applied to the plaintiffs to take him and his wife to their home, and take care of them during their lives, and, in consideration, agreed to devise and bequeath to them the land in controversy; that plaintiffs accepted the proposition, and in the fall of 1862 took defendants, Morgan and Celia Barnett, into their house, who became members of the family and were kindly and faithfully cared for by the plaintiffs, who are still ready to keep them in comfort and happiness during their lives; that, in pursuance of said agreement, the said Morgan, in 1865, destroyed an old will, and made a new one devising and bequeathing to petitioners all his property; that the possession of the farm in controversy was given up to plaintiff, Arrington, who made improvements upon it, rented it out, and paid the taxes. The petition further shows that on the 10th day of August, 1867, the said Morgan L. Barnett, in violation of his agreement, without consideration, and with full knowledge by the parties of all the facts, conveyed the principal part of his farm to said A. Madison Gupton, and the remainder to his wife, the said Celia, who have taken possession of the same. The petition closed with several specific prayers and with a prayer for general relief. . . .

From a careful examination of all the evidence bearing upon this part of the case, I cannot find that the plaintiffs failed in living up to the spirit of their agreement. It does not appear that any discontent had arisen in the mind of Mr. Barnett until the latter half of the fourth year of his residence with them, and we have seen how trifling were the first causes. An old man, nearly eighty, struck with paralysis, unable to walk, who, as he says, had recently given hundreds of dollars to the plaintiff and his family, who had made his will, leaving them everything, became excited about the collection of a few dollars by the one who was soon to receive everything; and when he paid him, while others were present, charges him, the next time he calls upon him, in a sarcastic and cutting manner, with bringing in witnesses to see it paid. It is manifest that the whole trouble was in the excited mind of Mr. Barnett, but how the feeling arose and increased does not appear from any direct testimony. It could not have sprung from Gupton and wife absenting themselves from his room, as he charges them both with doing, because it was the cause of and not

the effect of their being less familiar, and because, from the whole testimony, it is clear that his recollection of time, as well as events, is not to be relied on. A fact or two, however, throws a little light upon the matter. Defendant, A. Madison Gupton, is a nephew of plaintiff and was a frequent visitor at his house. In April it is shown that he asked Mr. Barnett to let him have his farm, and he would take care of him. Nothing further appears except that about the first of August, while the plaintiffs were away from home for some ten days, this Madison brings a magistrate to Mr. Gupton to acknowledge the deeds, and then the whole matter was closed up. This man, a frequenter at the house, his eye on the farm from the beginning of the troubles, his final success in obtaining the property—put these facts together, and may we not conjecture that he at least was not indifferent to the continuance of the difficulties that were about to prove so fruitful to him?

That an agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding, is settled in this State by *Wright v. Tinsley*, 30 Mo. 389, where the subject is considered at length and the authorities reviewed.

The statute of frauds is set up as a defense, inasmuch as the original agreement was not made in writing. But this defense will not avail for the obvious reason that the contract was in a great measure performed by both parties. The plaintiffs took Mr. and Mrs. Barnett to their house and provided for them until they left. The possession of the farm was also surrendered and the will was executed according to the terms of the contract. Nothing remained to be done by either party except the continued support of the makers of the will, which is tendered by the plaintiffs. Such partial performance has always been held to take the case out of the statute. (20 Mo. 84; 45 Mo. 288; *Sugd. Vend.* ch. 3, § 7, and cases cited in notes; 2 *Sto. Eq.* § 759 *et seq.*) Contracts like the one under consideration have been before the courts, and have uniformly been held to be valid when partially performed, and when the refusal to complete them would work a fraud on the other party. In *Brinker v. Brinker*, 7 Penn. St. 53, such an agreement was sustained, not because possession of the property was delivered, but because the will was executed according to the terms of the agreement.

The cases of *Van Dyne v. Vreeland*, 3 Stockt., N. J., 370, and *Davidson v. Davidson*, 2 Beasley, N. J., S. C., were both very similar to the present, and the verbal promises of the owners of the property

were enforced for the reason that the services and support contracted for had been rendered.

Defendants claim that the plaintiff is entitled to no relief in this action for the further reason that Barnett, by his deed to Madison Gup-ton, has put it out of his power to dispose of his property by will; that in any event the contract can not be fully executed until the death of Barnett, and hence his only remedy is by a suit for damages for a breach of the agreement. In support of this claim reliance is had upon *McQueen v. Chouteau's Heirs*, 20 Mo. 222, and upon *Hatch v. Cobb*, 4 Johns. Ch. 559, and *Kempshall v. Stone*, 5 Johns. 193, cited in that case. *McQueen v. Chouteau's Heirs* was a bill for specific performance founded upon a contract to sell, and the vendor had conveyed the property to a third person after having offered to fulfill. Upon this point the judge remarked that, in cases similar to this, courts of equity have refused to decree a specific performance of the contract, and have refused to entertain the bill for the purpose of compensating the complainant in damages, but have left him to his action at law on the agreement. The court, it will be seen, adopts no general rule, and the cases referred to are entirely consistent with the plaintiff's equity, even if specific performance could not be decreed.

Hatch v. Cobb was a case where the purchaser of land by contract had neglected to pay, and, after its conveyance by his vendor, filed his bill. The court decided that specific performance could not be decreed, that the complainant was not entitled to compensation in equity, and remitted him to his suit upon his covenant for damages if he was entitled to any. The court, however, admits that, in a special case, a bill for damages might be sustained; and, in referring to *Phillips v. Thompson*, 1 Johns. Ch. 131, where the bill was retained in order to afford compensation, says that the court made out a case of very clear equity for relief, and the remedy was precarious at law. The bill was dismissed in *Kempshall v. Stone* because "the remedy was clear and perfect at law by an action upon the covenant," the defendant having conveyed the land to a third person, for good consideration, without notice.

The doctrine of these cases is simply this: that when the vendor of land by contract conveys the property contracted to be sold to a third person, in such a manner that the land can not be reached, the court will not entertain a petition in equity for a specific perform-

ance merely for the purpose of compensating the purchaser in damages, but will leave him to his action upon the agreement. Some ground for equitable interference will be required, and in the case at bar there is abundant ground, even if the contract could not be specifically enforced. First, it is a parol contract, which can not be sued on at law, but which equity will enforce under the circumstances heretofore indicated. Second, Barnett has conveyed to Madison Gupton all his property, and a judgment for damages merely would be altogether useless. It must be made to fasten upon some property which can only be reached in equity, not by a creditor's bill, but as being subject to the plaintiffs' claim by the terms of the contract, or he is wholly without remedy. Third, the case made by the petition is altogether and throughout equitable; and having thus obtained jurisdiction, the court will give the plaintiffs any relief to which they are entitled.

A. Madison Gupton took with full notice, and in fraud of complainant's rights, and it is not in his power to remit us to a money demand. It would be a mockery, as well as a bounty to an unwarrantable interference by strangers in a case like the present, to say that the plaintiff is entitled to only a money judgment; and our courts have gone as far as any other in giving effectual relief. . . .

The judgments of the court below are reversed and the cause remanded, with directions to proceed as herein indicated. The other judges concur.

WEIS v. MEYER.

(Supreme Court of Arkansas, 1866, 1 S. W. 679.)

COCKRILL, C. J. Weis' complainant in equity, for the specific performance of a contract to convey lands, was dismissed upon general demurred, and he has appealed. He was not a party to the contract which he sought to enforce, but was the vendee of one who was named in it as a beneficiary of its provisions. The only question seems to be, did this give Weis the right to enforce the contract?

The complaint alleges that the owners of a plantation in Chicot County conveyed a part of it to Isaac Hilliard, in 1879, and sold

or leased other parts of the place to divers other persons, among whom were the mercantile firm of Dryfus & Meyer; that afterwards, when the lands were about to be sold under a decree foreclosing a lien superior to the rights of the vendees, the vendors, in order to protect them from injury, entered into an agreement in writing with Dryfus & Meyer, by which it was arranged that the latter parties should buy in all of the lands subject to be sold under the decree, the greater part of which still belonged to the original vendors, and immediately convey, by quitclaim deeds, to the parties who had already purchased parts of the plantation referred to; an arrangement being made by which Dryfus & Meyer should be made whole for the amount paid by them in discharging the decree. It also alleged that Dryfus & Meyer purchased the land under the decree, and took a conveyance to themselves in execution of the agreement; and that afterwards Dryfus conveyed to Meyer all his right, title, and interest in the premises, and that Meyer bound himself to carry out the agreement entered into by the firm, but that he now refuses to execute a deed to Hilliard, or to the appellant, who is Hilliard's vendee.

Taking the allegation of the complaint as true, Dryfus & Meyer, upon their purchase under the decree, held the naked legal title to the lands that had been previously conveyed to Hilliard in trust for him, and it was their legal duty to execute a deed to him in accordance with their contract. After the conveyance by Dryfus to Meyer, the latter held the legal title subject to the same duty. The obligation of Dryfus & Meyer was assumed for their own as well as for the express benefit of Hilliard and others in similar circumstances, and was induced by their common grantors, who were resting under a legal obligation to protect from harm the interests in the lands they had sold.

The right of a party to maintain an action on an agreement made with another for his benefit is a doctrine to which this court has given its assent, and it entitled Hilliard to maintain suit in his own right to enforce the contract set forth. *Hecht v. Caughron*, 46 Ark. 132, The appellant, by Hilliard's conveyance to him of his entire interest, succeeded to his rights, and was entitled to file the complaint in his own name.

The decree must be reversed, and the cause remanded, with instructions to overrule the demurrer.

ROBINSON v. APPLETON.

(Supreme Court of Illinois, 1888, 124 Ill. 276, 15 N. E. 761.)

SHOPE, J. This was a bill filed by the executors of the last will of James E. Cooley, deceased, for the specific performance of a contract, made by their testator with David B. Sears, since deceased, for the sale of several tracts of land. The law is well settled, that the vendor may have a specific performance of a contract for the sale of land decreed against his vendee. (*Chambers v. Rowe*, 36 Ill. 171.) The remedy in cases of specific performance is mutual, so that either the vendor or vendee may avail of it. Story's Eq. Jur. secs. 723, 789, 790, 796; *Andrews et al. v. Sullivan*, 2 Gilm. 332; *Burger et al v. Potter et al.* 32 Ill. 66.) This remedy extends in favor of the personal representatives of a deceased vendor (*Burger v. Potter*, supra), and against subsequent purchasers or assignees of the vendee, taking with notice. (Story's Eq. Jur. sec 789; *Champion v. Brown*, 6 Johns. Ch. 398.) The proceeding in this case may be regarded as in rem, as against appellants, who took as assignees of the original purchaser. It is clear that the vendor or his personal representatives can not have a personal decree against appellants, unless they, in their purchase from the vendee, Sears, assumed the payment of the unpaid purchase money as part of the price they were to pay Sears for his interest in the land. . . .

WHATMAN v. GIBSON.

(High Court of Chancery, 1838, 9 Sim. 196.)

THE VICE-CHANCELLOR. The Defendant Gomm admits, by his answer, that he does threaten and intend to use the house numbered seven, as a family hotel and inn and tavern; there can be no doubt, therefore, that he has brought himself within the words of the covenant in the deed of February 1799.

Now, though neither the conveyance to Cull, nor the conveyance to Austin (under which the parties severally claim), has been pro-

duced, yet, I must take it as a fact, that those deeds recited that Cull and Austin had executed the deed of February 1799: and, with respect to that deed, it seems to me that the matter is to be considered, in this Court, not merely with reference to the form in which the covenants are expressed, but also with reference to what is contained in the preliminary part of the deed, namely, that Fleming had determined and proposed, and did thereby expressly declare that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row, that the several proprietors of such land respectively for the time being should observe and abide by the several stipulations and restrictions thereafter contained or expressed in regard to the several houses to be erected thereon, and in all other particulars. Then follow the stipulations; and, whatever may be the form in which the covenant is expressed, the stipulations are plain and distinct. One of them is that none of the proprietors of any of the several lots or parcels of land intended to form the row, shall, at any time or times or on any account or pretense whatever, erect or suffer to be erected on any of the several lots or parcels of land, which shall be to them respectively belonging for the time being or on any part of them or any of them, any public livery stables or public coach-house, or use, exercise or carry on, or suffer to be used, exercised or carried on thereon or on any part thereof, the trade or business of a melting founder, tobacco-pipe maker, common brewer, tallow chandler, soap boiler, distiller, innkeeper, tavern keeper, common alehouse keeper, brazier, working smith of any kind, butcher or slaughterman, or any other noxious or offensive trade or business, whereby the neighborhood may be, in any respect, endangered or annoyed, or burn or make, or suffer to be burnt or made, on any of the said lots or parcels of land or on any part of any of them, any bricks or lime; and that no other building or buildings than good dwelling-houses or lodging-houses shall be erected in front of any of the said lots.

It is quite clear that all the parties who executed this deed, were bound by it: and the only question is whether, there being an agreement, all persons who come in as devisees or assignees under those who took with notice of the deed, are not bound by it. I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighboring houses used in such a way as to preserve the general uniformity and respectability of the row, and consequently

in preventing any of the houses from being converted into shops or taverns, which would lessen the respectability and value of the other houses.

As the release of 1802 recites that Austin executed the deed of 1799, I must take it as a fact that he did execute it; and then, whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think that there is a plain agreement which a court of equity ought to enforce: and, as the Defendant Gomm admits that he intends to carry on one of the prohibited businesses, he comes within the purview of the deed, and ought to be restrained from so doing by the injunction of this Court. . . .

Injunction granted.

HARTMAN v. WELLS.

(Supreme Court of Illinois, 1913, 257 Ill. 167, 100 N. E. 500.)

FARMER, J. The bill in this case was filed by appellant to enjoin appellees from violating a building line agreement entered into between appellant and the grantor of appellees, and for a mandatory injunction to compel appellees to remove certain porches erected in violation of said building line agreement. . . .

The existence of the building line agreement and its violation by appellees are not controverted. They claim they had no actual notice of the existence of said agreement, but it was a matter of record before they or their predecessor in title purchased lot 3, and they were bound to know of its existence. The real defense made by appellees is that appellant's property is not damaged by the porches constructed in violation of the agreement, and that on account of their cost, the material out of which they are constructed and the nature of the construction it would be inequitable to compel their removal. No complaint is made by appellees of the injunction restraining them from completing, repairing or rebuilding said porches, or any part thereof, which project more than four feet east of the building. We are at a loss to understand why, if it was inequitable to require the removal of said structures projecting beyond the building line, it would not also be inequitable and unauthorized to enjoin their completion and

maintenance. It is apparent that in their incompleated state they are of little value for use, and if their completion and repairing would be a violation of the agreement authorizing interference by injunction, it would seem their maintenance would be also. Restrictions against the use of property held in fee, it is true, are not favored, and doubts will, in general, be resolved against them, but where the intention of the parties is clearly manifested in the creation of the restrictions they will be enforced in a court of equity. (*Eckhart v. Irons*, 128 Ill. 568; *Hutchinson v. Ulrich*, 145 id. 336, *Hays v. St. Paul M. E. Church*, 196 id. 633; *Curtis v. Rubin* 244 id. 88.) It is true, parties may by their own acts place themselves in a position where equity will not interfere, or the property and the use to which it may be put and the character of the vicinity and environment may be so changed that the purposes for which the restrictions were imposed will not be affected by their enforcement. In such cases enforcement may be denied. (*Ewertsen v. Gerstenberg*, 186 Ill. 344; *Curtis v. Rubin*, *supra*.) There was nothing shown as to the use of the property here involved, its environment or the acts of the parties which would bring it within the class of cases where the enforcement of such restrictions has been denied. The building of the porches was begun without the knowledge of appellant and when he was absent from home. As soon as he returned and discovered the building line agreement was being violated he made known to appellees his objections. Appellant had kept and performed the covenants on his part by paying to Lederer the \$2000 in cash and giving lot 3 the benefit of an easement of five feet off the north side of lot 4 for light and air. All of this appellees were bound to know, as the agreement was a matter of record.

The evidence as to whether appellant's property was damaged by the violation of the agreement was conflicting, but we do not think that was a material question. In *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, the court, in discussing the enforcement of negative covenants in courts of equity, said it was well settled that equity would entertain bills for injunctions to prevent their breach although the breach would cause no substantial injury or although the damages might be recoverable in an action at law. "This is upon the principle that the owner of land selling or leasing it may insert in his deed or contract just such conditions and covenants as he pleases touching the mode of enjoyment and use of the land. As said in *Steward v. Winters*, 4 Sandf. Ch. 587: 'He is not to be defeated when the cove-

nant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition.' (Hill v. Miller, 3 Paige, 254; Macher v. Foundling Hospital, 1 Ves. & B. 188; High on Injunctions, 1142.) In this latter class of cases the court proceeds upon the ground that the grantor or lessor having expressly stipulated that the grantee or lessee shall not do the particular thing complained of, the latter is bound to refrain, and the former is not required to submit to the opinions of others as to whether he will or will not suffer substantial injury." That case was cited and quoted in substance in the opinion in *Star Brewery Co. v. Primas*, 163 Ill. 652. In *Steward v. Winters*, *supra*, cited in both the last mentioned cases, Vice-chancellor Sanford, delivering the opinion of the court, said: "It is said that the remedy at law for damages is adequate, and that, so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown there can be no injury at all. I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land selling or leasing it may insist upon just such covenants as he pleases touching the use and mode of enjoyment of the land, and he is not to be defeated, when the covenant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has the right to define the injury for himself, and the party contracting with him must abide by the definition." We do not regard it necessary to cite further authority upon this question. None in this State, at least, will be found to the contrary.

In our opinion the case made by appellant entitled him to the mandatory writ prayed for, commanding appellees to remove the structures extending beyond the building line. . . .

IN RE NISBET AND POTTS' CONTRACT

(Supreme Court of Judicature, (1906) 1 Ch. Div. 386, 409.)

COZENS-HARDY, L. J. Now, the suggestion which is at the root of the appellant's argument is this, that a squatter can wholly disregard restrictive covenants affecting a building estate. That is so startling

a proposition, and so wide-reaching, that it must be wrong. The value of estates in the neighborhood of London and all large towns, and the amenity of those estates, depend almost entirely upon the continuance of the mutual restrictive covenants affecting the user and the enjoyment of the property; and when we are told that the squatter, notwithstanding that he is a mere trespasser, is to be in a better position than that occupied by a person deriving a title strictly through the original covenantor, one feels that there must be an answer to the argument; and I think the authorities, when carefully examined, make the answer quite plain. The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement not in any way capable of being affected by the provisions of the Statute of Limitations on which the squatter relies. The only rights extinguished for the benefit of the squatter, under s. 34 are those of persons who might, during the statutory period, have brought, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because unless and until there is a breach, or a threatened breach, of such a covenant, it is impossible for the person entitled to the benefit of it to bring any action. It appears, therefore, so far as the squatter himself is concerned, that both during the currency of the twelve years and after the expiration of the twelve years, there could be no possible answer to the claim of anyone seeking to enforce the covenant. In fact, there would, so far as he is concerned, be no difference between this covenant, which is in the nature of an equitable easement, and a legal easement strictly and properly so called. But although the squatter took the property subject to this equitable burden, it may be that the present vendor, who purchased from or through the squatter is able to say that the burden does not affect the property in his hands. But what must he prove in order to claim this exemption? He must prove that he is a purchaser for value of the legal estate without notice. If in the old days he had simply pleaded "I am a purchaser for value," such a plea would have been demurrable; he would have had to go further and allege and prove that he was a purchaser for value without notice, and he must do the same at the present day. Now, can the present vendor allege and prove that he was a purchaser for value without notice? I think not. It is not necessary, of course, to prove actual notice; that has not been contended. But if a purchaser chooses to take a title without

making full inquiries, he cannot be allowed to say that he had no notice of that which a full abstract would have disclosed. On this point the observations of North, J., *In re Cox and Neve's Contract* (1891) 2 Ch. 109, and the passages from his judgment which have been referred to, are so much in point that I may venture to read them. He says: "I must say that I dissent entirely from the proposition that the purchaser would have taken the property free from the restrictive covenant, if he had made no inquiry. On the contrary, I think he would have been bound by it, and for this reason. He had agreed by the bargain contained in the conditions of sale to accept a title of less than forty years. That cannot relieve him from all knowledge of the prior title, or, it would come to this,—that, if a man was content to purchase property on the condition that he should not inquire into the title, he would acquire a title free from any existing restrictions, and would not have constructive notice of any incumbrance."

Of course, the law does not permit of anything so absurd as that, and I should be sorry to think that there could be any real doubt upon the subject. In the case of a lessee the law has gone possibly one step further, because in *Patman v. Harland* 17 Ch. D. 353, it has been held, and so far as I know it has never been questioned, that a lessee is affected with notice of any restrictive covenants the existence of which he would have learned if he had investigated the lessor's title, even though, since the Vendor and Purchaser Act, 1874, the lessee is not entitled, under an open contract for a lease, to require the production of the lessor's title. As Sir George Jessel in that case said, that alteration of the law did not really prevent or interfere with the application of *Tulk v. Moxhay*, 2 Ph. 774. If the lessee wanted to escape from that obligation, he, in agreeing to take the lease, should have required the production of the lessor's title. So that the doctrine has been extended, and I venture to think properly extended, not merely to a case where a purchaser under an open contract would be affected with notice of a document forming part of the chain of title, but also, at least in the case of a lease, to a case where a purchaser under an open contract would not be entitled to require production of the documents which alone could give him notice. I think that a squatter, who has been in possession for more than twelve years, is certainly in no better position than any other person. He cannot make a good title without delivering an abstract extending over the full period; and if the pur-

chaser is willing to take a title depending upon the Statute of Limitations and the effect of s. 34, he must take such title subject to the equitable burden, as it is often called by analogy to *Tulk v. Moxhay*, 2 Ph. 774, except in so far as it can be shown that the equitable burden has been got rid of by means of a purchaser for value without notice.

BADGER v. BOARDMAN.

(Supreme Court of Massachusetts, 1860, 16 Gray, 559.)

Bill in Equity to enforce a restriction in a deed from Oliver Downing to the defendant of one of several parcels of land on the westerly side of Bowdoin Street in Boston.

From the bill and answer and evidence it appeared that Downing, being the owner of all these parcels of land, which were described on a plan thereof, dated the 12th of December, 1843, and recorded in the registry of deeds on the 21st of March, 1844, conveyed to the defendant in fee simple the parcel or lot numbered 3 on the plan, with the building thereon standing, by metes and bounds and "subject to the following restriction that no out buildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon;" and that on the 25th of December 1844, Downing conveyed the parcel or lot numbered 4 on the plan to George Roberts, with all the rights, easements, privileges and appurtenances thereto belonging, which afterwards came by mesne conveyances to the plaintiff. The bill was dismissed, and the plaintiff appealed.

BIGELOW, C. J. The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing to Boardman was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union Railway*, 11 Gray, 359, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a

remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to enure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title, which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part. However this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of *Whitney v. Union Railway*, above cited. And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle, that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity by accepting the grant the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit.

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BILL DISMISSED, WITH COSTS.

DICKENSON v. GRAND JUNCTION CANAL CO.

(Cases in Chancery, The Rolls Court, 1852, 15 Beav. 260.)

THE MASTER OF THE ROLLS. . . . The object of the suit is to restrain the Defendants, the Grand Junction Canal Company, from using a well sunk by them near Tring, in Bucks, at a place called the Cow Roast Lock, to compel them to fill up this well, and to restrain them from excavating any other well, whereby the supply or flow of water in the stream called the Bulbourne may be obstructed from flowing down to the Plaintiffs' mill. . . .

The first question that arises under this state of circumstances is, whether this is such a contract, as this Court will restrain the parties to it from violating, and upon this I cannot entertain the slightest doubt. The consideration for it was valuable, and the Company obtained the advantage of that consideration in the cessation of those continued actions by which they were harassed, and in which, up to that time, they had failed, and had had to pay large and repeated damages.

The next question is, whether the acts of the Defendants are a violation of this contract. The report of Mr. Cubitt shows conclusively, that by means of the pumping at the well, the waters are diverted from the said rivers; and independently of the decision of the Court of Exchequer, I should, on the evidence of his report, have entertained no doubt that the Company had committed a violation of this contract and of this Act of Parliament, by pumping the water out of this well into the summit level of the canal. The decision of that Court, however, on the case sent by Lord Langdale, is in my opinion conclusive on this subject, notwithstanding the arguments I have had addressed to me, to distinguish the facts there stated from the facts in evidence before me.

If it be a contract duly entered into between the parties, it is no answer to a violation of it to say, that it will not inflict any injury upon one of the contracting parties. If the Plaintiffs have purchased from the Company a right to preserve the waters in the Rivers Bulbourne and Gade from being diverted in any other manner than as diverted at the passing of the Act of 58 Geo. 3, it is no answer to them

to say, that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated.

It is therefore, in my opinion, a matter of no moment in this case, that the Plaintiffs have given no evidence of any actual damage done to them, or of any actual diminution of water at their mills. Having established that the acts of the Defendants are a violation of the contract entered into between them and the Plaintiffs, and a violation of the Acts of Parliament passed to carry such contract into effect, the Plaintiffs are entitled to call upon this Court to protect them in the enjoyment of that right which they have so purchased, and this Court is bound to preserve it from being broken in upon.

I am of opinion, therefore, that I must grant a perpetual injunction to restrain the Company from further excavating &c. &c., and that the Defendants must pay the costs of this suit.

CLEGG v. HANDS.

(Supreme Court of Judicature, 1890, 44 Ch. Div. 503.)

COTTON, L. J. . . . The covenant in this case is that the said lessee will not at any time during the continuance of the demise, directly or indirectly, buy, receive, sell, or dispose of, or permit to be bought, received, sold, or disposed of, in or about the demised premises, any ales or stout (other than best stout) other than such "as shall have been bona fide purchased of the said lessors, or from them, or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." It is said that these latter words shew that the covenant was not intended to extend to the assigns of Clegg & Wright, because part of the definition of the persons who are included in the expression "lessors" is repeated here in terms which exclude the full application of that definition. But I cannot think that that is so. The covenant, reading it by the light of the definition, was entered into with the lessors, Clegg & Wright, and each of them, and the heirs, executors, administrators, and assigns of them and each and every of them; and al-

though it perhaps was not necessary to have added these words at the end of the covenant, I cannot think that that addition prevents the covenant from being a covenant with the assigns of those who were the grantors of the lease to the Defendants.

But then it is said, as I understand the argument, that it can only have been intended to include such assigns as carry on the business of brewers at the particular brewery which was assigned to Cain, and where the business of brewing is no longer carried on. The case of *Doe v. Reid*, 10 B. & C. 849, was much relied upon for the purpose of that construction; but it was a case where the language was different, and in my opinion there is nothing here to shew such an intention. Then there is this clause: "Provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee of good quality and at the fair current market price." Well, it was pointed out by one of us in the course of the argument, that there is some protection granted here to the publican by this provision that the beer shall be of good quality, and that it shall be supplied at the fair current market price.

That, in my opinion, shews clearly that it was not intended in this case to restrict the benefit of the covenant to the persons carried on this brewery at this particular place, for it does not in any way refer to the beer which is to be provided, as being beer made by the landlords or their assigns. The words are, "Provided they or he shall at such time deal in or vend such liquors." It shows that there was no intention whatever to stipulate that the persons entitled to the benefit of the covenant were to be persons who made beer. It was not provided that they should continue to make the beer they were selling; but it was provided that it should be of good quality and be supplied at the fair current market price, and that they should deal in and vend beer. Considerable light was to my mind thrown upon the true intention of the parties by what was put before us by Mr. Collins in his reply, that at the time the covenant was entered into these landlords not only made beer, but bought beer, and supplied those who were not bound by any restrictive covenants to take beer from them alone. That, I think, shews what they were intending to provide for, viz., not that they should only supply beer which they themselves made, but that they should go on doing what they were then doing, supply beer either by making it, or by buying it, so long as they were able to supply it of good quality and at the fair market price. . . .

But then it is said that this Court has decided that the doctrine of *Tulk v. Moxhay* will not be extended beyond a restrictive covenant. Now, in *Tulk v. Moxhay* the covenant was not in its terms restrictive, but it implied that the piece of ground in question there was to be used only as an ornamental garden. That again implied that the purchaser was not to build on it, which was what he was about to do. In this case, even if the covenant was in form a contract to buy all beer from the Plaintiffs, that would involve a negative contract that he should not buy his beer from anybody else; and in my opinion this case does not come within the rule which we laid down in the case of *Haywood v. Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 403. In that case land had been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, and the Court refused to enforce the covenant, considering the doctrine of *Tulk v. Moxhay* not applicable to the case of a covenant which was not in its nature restrictive, and could only be enforced by making the owner of the land put his hand in his pocket. In my opinion, both on the ground that here the covenant did run with the land, and also on the ground that the doctrine of *Tulk v. Moxhay* does apply, I think the order of the Vice-Chancellor is right.

LINDLEY, L. J. . . . Then comes a question as to whether this contract is one which can be enforced in equity, having regard to the doctrine relating to specific performance and injunctions. Mr. Collins has suggested that, although this covenant is negative in point of form, it is affirmative in substance, and that therefore an injunction ought not to be granted. But when you look at the whole of this case, you find that the covenant, which he suggests is affirmative, really involves a negative element in it. If you treat the covenant to keep open this place as a public-house and to sell beer there as an affirmative covenant, you cannot treat the covenant as to the buying of beer as merely an affirmative covenant to buy beer of the lessors. You must put in the words, "and the lessors exclusively." If you get that, you get a negative portion of the covenant which can be properly enforced consistently with the doctrine applicable to cases of this kind; and therefore, whether you regard it as an affirmative covenant with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced.

For these reasons it appears to me that the decision is right, and the appeal must be dismissed with costs.

GOULD v. PARTRIDGE.

(Supreme Court of New York, 1900, 52 N. Y. App. Div. 40, 64 N. Y. Supp. 870.)

The Phoenix Mills was the owner of a valuable water privilege, as well as of the means and appliances for utilizing the same. It was also the owner of a tract of land for which it had no particular use. To meet this condition of affairs it subdivided its surplus land into parcels and then sold the same to various parties. In order, however, to enhance the value of the land thus placed upon the market, and induce purchasers to buy, the company agreed to furnish a certain amount of power with each parcel sold. As a consequence, the land with this incident attached to it found ready sale, and the purchasers thereof immediately set about to erect buildings for manufacturing purposes upon their respective parcels, in reliance, doubtless, upon the right to the water power which their several grants secured to them. In these circumstances, if, as claimed by the plaintiff, there was a community of interest or a privity of estate between the original grantor and grantees, the covenant made by the former would unquestionably be one which would run with the land and one for the breach of which an action at law could be maintained by the covenantee or his grantees. But, even in the absence of any community of interest or privity of estate, it has been held that the owners of land may by agreement create mutual easements for the benefit of each other's land, which will be enforced in equity; that an easement of this character can be created by grant, and that the right to its enjoyment will in like manner pass as appurtenant to the premises in respect of which it was created. In discussing a similar proposition in the American note to *Spencer's Case*, 1 Smith, Lead. Cas. (6th Am. Ed.) 167, it was said: "But although the covenant when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the un conveyed estate, and ren-

dering it appurtenant to the estate conveyed; and, when this is the case, subsequent assignees will have the right and be subject to the obligations which the title or liability to such an easement creates." . . .

The defendant took her title to the premises owned by her with actual and full notice of the covenant in the Howe deed, and of all the equities arising therefrom. Moreover, she and her predecessors in title gave practical construction to the language and obligations of that covenant by sustaining the burden which it imposed for a long term of years; and in view of these circumstances it would, as was said by Allen, J., in *Trustees, etc., v. Lynch*, supra, "be unreasonable and unconscientious to hold (her) absolved from the covenant in equity for the technical reason assigned that it did not run with the land so as to give an action at law." We think the interlocutory judgment appealed from should be affirmed, with the usual leave to answer. . .

ROBERTS v. SCULL.

(New Jersey Court of Chancery, 1899, 58 N. J. Eq. 396, 43 Atl. 583.)

GREY, V. C. . . . The complainant in this suit is the owner of a house and lot situate on the east side of United States avenue in Atlantic City. She alleges that forty years ago one Brown, being the holder in fee of a tract of land of which her lot formed a part, opened a street, now called United States avenue, and built two houses on each side of it, facing on said avenue and set back from the street or property line a distance of thirty-two feet; and afterwards sold lots on either side of said avenue; and that in each of the deeds conveying those lots there was inserted a condition that the house or houses to be built thereon should be in keeping with those already built by him and set back a distance of thirty-two feet from the property line, and that no stables or outbuildings should be erected on any of said lots; and that as a result of said restrictions United States avenue has been built up with cottages in good style, and said lots have been kept free from all buildings except such as face on United States Avenue. . . .

It appears to be settled law in the state that restrictive covenants of the character set forth in the bill, will be enforced in equity, not only against the original grantee, but also against all subsequent pur-

chasers with notice of the covenant. *De Gray v. Monmouth Beach Co.*, 5 Dick. Ch. Rep. 329; *Hayes v. Waverly &c. Railroad Co.*, 6 Dick. Ch. Rep. 345, and cases there cited.

The parties who may enforce such restrictive covenants are the original grantors with whom they were made and all subsequent purchasers of the lands to be benefited by them. The parties against whom they may be enforced are the grantees who accept deeds containing the restrictions, and all those who subsequently purchase the restricted lands with notice of the covenant.

The principle upon which a person not a party to a restrictive covenant is permitted to enforce it, is based upon the idea that the subsequent purchaser of lands to be benefited by the enforcement has made his purchase and paid his consideration in the expectation of the benefit to accrue to the land bought, from the observances of the restriction imposed by his grantor upon the use of the lots previously conveyed to the covenantor, and no injustice is worked upon the covenantor or his assigns with notice of the covenant by restraining them from using the land in a manner inconsistent with the contract under which they obtained the title and which fixed the price they paid with relation to the restrictions imposed. *Tulk v. Moxhay*, 2 Phil. 774. That is, the prior purchaser from the common grantor, by reason of the restrictions imposed, paid less price for his land; the party who subsequently purchased from the common grantor a part or the whole of the land to be benefited by the restrictions, bought in consideration of the benefits coming to his lot because of the restrictions. This relation is such a privity as supports an equity in the subsequent purchaser of the lot benefited by the covenant to enforce it.

But this rule, while operative to enable a subsequent purchaser of land to be benefited by a restrictive covenant to enforce it against the prior purchaser, who made it, and against his assigns, with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner to enforce a restriction imposed by the latter upon a lot subsequently conveyed. *De Gray v. Monmouth Beach Co.*, 5 Dick. Ch. Rep. 329. The prior purchaser did not buy in expectation of any benefit to be derived from the subsequent covenant not yet in existence, nor did the subsequent purchaser make his covenant with the common grantor with relation to lands which the latter had previously conveyed and in which he had no interest.

In order to entitle prior purchasers from a common vendor, or those claiming under them, to enforce such covenants, it must be shown that they are parts of a general plan adopted for the development and improvement of the property by laying it out in streets and lots, prescribing a uniform building scheme, regulating size and style of houses, or uses to which the buildings may be put. *De Gray v. Monmouth Beach Co., supra*. When there is such a general plan and covenants imposing uniform restrictions, each purchaser, as he buys his lot and accepts the restrictive covenant, pays his purchase-money in consideration of, and relying upon, the subsequent execution of the general plan by the imposition of like covenants upon succeeding purchasers. This equity arises in favor of a grantee under the restriction of the uniform plan, as well as against the original owner who promulgates and sells lots on the general plan and attempts to make subsequent conveyances in avoidance of it, as against a grantee who accepts a deed with the restrictions, and does acts in breach of them. . . .

There is a suggestion in the bill that there was such a general plan of improvement, but the supporting proof depends entirely upon the complainant's unaided deposition. She was not a purchaser from Brown, the common grantor, nor does she appear to have any knowledge of his original design in laying out the property. She testifies as to her information and belief as of the time when she purchased from Ladner, or some subsequent grantee, that the lot north of her and those on United States avenue were subject to covenants "that no dwelling-house could be erected on any of said lands except those that front on United States avenue, and set back thirty-two feet from said avenue."

No map of the lots is shown marking the building line, nor is there any proof of any action by the common grantor, Brown, indicating a design on his part to develop the land upon a uniform plan of which the covenants in the deed of Brown to Graham for the defendant's lot, fixing the building line, &c., formed a part.

The complainant herself does not appear to have any knowledge upon the subject save from hearsay. The coincidence that all the deeds conveying any portion of the property contained the same covenants would not, if it were true, be sufficient of itself to show that the covenant made by Graham on receiving his deed from Brown in 1888 was intended to be for the benefit of Ladner's lot, who had bought

from Brown in 1882, six years before. *Mulligan v. Jordan*, 5 Dick. Ch. Rep. 363.

The proof submitted does not support the claim that the covenants were part of a general building plan. . . .

McCLURE v. LEAYCRAFT.

(New York Court of Appeals, 1905, 183 N. Y. 36, 75 N. E. 961.)

This action was brought to restrain the defendant from erecting an apartment house upon premises owned by him situate on the southwest corner of 145th street and St. Nicholas avenue in the city of New York.

Either party owns land nearly adjacent to that of the other and on the same block. There is a four-story dwelling designed for but one family standing on the land of the plaintiff, while the premises of the defendant are vacant. Both parties took title from a common source and subject to a covenant, made November 9th, 1886, against the erection at any time upon any part of the tract to which the lands of the respective parties belong "of any buildings except brick or stone dwelling houses" or "any tenement, apartment or community house." On the 8th of December, 1886, the covenant was so modified as to permit the erection of churches upon the tract and to limit the period of restraint to twenty-five years. These covenants by express agreement ran with the land and the instruments containing the same were duly recorded as conveyances in the proper office. Shortly before the commencement of this action the defendant filed plans to erect and had begun the erection upon his premises of a six-story modern apartment house, "divided into forty-two independent and separate suites of rooms or apartments, each suite containing a complete set of rooms and improvements such as are usually found in a first-class private dwelling house."

In addition to the foregoing facts the trial court found as follows: "Tenth. That at the time when the conveyances hereinbefore set forth were made and entered into, the real property in the vicinity of the property hereinbefore described was occupied exclusively by small private dwellings, and was classed as a private residential district, and

such houses were built solely for one family and occupied by one family, and there were no places of business, flats, tenements or apartment houses in the immediate neighborhood of the property affected by the said covenants.

"Eleventh. That since the making of the said covenants and within the period of about ten years last past great changes have occurred in the neighborhood and in the class of buildings erected upon the property in said neighborhood, and in the immediate vicinity of the premises owned by the plaintiff and the defendant, and there has been erected upon such property, including the three corners directly opposite to defendant's premises, large apartment houses having a great many apartments therein, several on each floor and several stories in height, and which are occupied on the ground floor by places of business and used for business purposes, numerous flats or tenement houses have been built on the block fronting on One Hundred and Forty-fifth street between St. Nicholas and Bradhurst avenues, which is in the vicinity of plaintiff's and defendant's property."

"Fourteenth. That the erection upon the said land of the said apartment house which the defendant proposes to erect thereon will not decrease the fee value of the plaintiff's premises or of the land and dwellings within the tract hereinbefore described, but will increase the value thereof, and the use of the same as an apartment house will not make the neighborhood undesirable nor decrease the value of the adjoining property.

"Fifteenth. That the change which has taken place in the character of the neighborhood has made the property, including the tract hereinbefore described, especially the land owned by the defendant, undesirable for the erection of a private dwelling thereon.

"Sixteenth. That by reason of the change in the character of the neighborhood and of the immediate vicinity of plaintiff's property and defendant's property the same has been so altered as to render inexpedient the observation of the said covenants, and it would be inequitable to enforce the covenants hereinbefore set forth against the defendant, as the enforcement of the same would cause him great damage and would not benefit the owners of the adjoining property."

The complaint was dismissed on the merits, for the reason, among others, "that the character and condition of the neighborhood have so changed since the making of the said agreements that it would be inequitable to enforce a covenant prohibiting the erection of a structure

such as the defendant proposes to erect and equitable relief enjoining the defendant from erecting the said structure should be refused."

VANN, J. . . . Assuming, therefore, that the defendant was about to violate the covenant, the question is whether upon the facts found and approved by the courts below relating to the radical change in the situation of the property affected by the covenant, a court of equity was bound to refuse equitable relief in the form of an injunction and to leave the injured party to recover his damages in an action at law. If the granting or withholding of a permanent injunction is within the absolute discretion of the Supreme Court, the exercise of that discretion by the Appellate Division in favor of the plaintiff is beyond our power to review; but if the facts found compel the conclusion, as matter of law, that an injunction should be refused, as inequitable, the order of reversal was wrong and the judgment rendered by the trial court should be restored.

While a temporary injunction involves discretion, a permanent injunction does not when the facts conclusively show that it would be inequitable and unjust. A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice, when the courts of law, with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is equity. It withholds its remedies if the result would be unjust, but freely grants them to prevent injustice when the other courts are helpless. It cannot set aside a binding contract, but when the effect would be inequitable owing to facts arising after the date of the agreement and not within the contemplation of the parties at the time it was made, it refuses to enforce the contract and remands the party complaining to his remedy at law through the recovery of damages.

These principles were applied by this court in an important case which we regard as analogous and controlling (*Trustees of Columbia College v. Thacher*, 87 N. Y. 311). In that case adjoining landowners in the city of New York had entered into reciprocal covenants restricting the use of their respective lands to the sole purpose of a private residence and expressly excluding "any kind of manufactory, trade or business whatsoever." After the lapse of nearly twenty years the defendant permitted a building upon his land, which was bound by the

covenant, to be used for the business of a tailor, a milliner, an insurance agent, a dealer in newspapers and tobacconist. After commencement of an action by the other landowner to restrain such use an elevated railway was built and a station located in the street in front of the premises of both parties. It was found as a fact that the "railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation. The said railway and station, however, do not injuriously affect all the property fronting on Fiftieth street and included in the said covenant, but only a comparatively small part thereof."

The trial court awarded a permanent injunction and the General Term affirmed the judgment, but the Court of Appeals reversed and dismissed the complaint on the ground that a contingency, not within the contemplation of the parties, had frustrated the scheme devised by them and rendered the enforcement of the covenant oppressive and inequitable.

This court obviously held that an injunction, under the circumstances, was not within the absolute discretion of the Supreme Court, for otherwise, according to its uniform rule of action, it would not have reversed the judgment or dismissed the complaint. The opinion of Judge Danforth, concurred in by all the members of the court, declared that there was a clear breach of the covenant which, under ordinary circumstances, would entitle the plaintiff to an injunction, but, he said, "though the contract was just and fair when made, the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. (*Willard v. Tayloe*, 8 Wall. 557; *Thomson v. Harcourt*, case 66, p. 415, vol 2, *Brown's Parliamentary Reports*; *Davis v. Hone*, 2 Sch. & Lef. 340; *Baily v. De Crespigny*, L. R. (4 Q. B.) 180; *Clarke v. Lockport and Niagara Falls Railroad Company*, 18 Barb. 350)."

After reviewing the authorities cited, the learned judge continued: "In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have

been sustained, they must, in any proper action, be allowed. But on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference if the discretion of the court is to be governed by the principles I have stated, or in the cases which those principles have controlled. . . . The road was authorized by the legislature, and, by reason of it, there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood, and property values. It has made the defendant's property unsuitable for the use to which by the covenant of his grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity."

This case was followed in *Stokes v. Stokes* (155 N. Y. 581, 590); *Amerman v. Deane* (132 N. Y. 335, 359); *Conger v. N. Y., W. S. & B. R. R. Co.* (120 N. Y. 29, 32); *Page v. Murray* (46 N. J. Eq. 325, 331). (See, also, *Jewell v. Lee*, 96 Mass. 145; *Taylor v. Longworth*, 14 Peters, 172, 174; *Duke of Bedford v. Trustees British Museum*, 2 My. & K. 552; *Sayers v. Collyer, L. R.* (24 Ch. Div.) 170).

So long as the Columbia College case stands, the judgment appealed from cannot, for the same principle controls both. In each the changed condition was wholly owing to the lawful action of third parties, which made the allowance of an injunction inequitable and oppressive. Indeed, an injunction in the case before us would be more oppressive than in the case cited, for it is expressly found, and the finding is final here, that the proposed erection would actually increase the value of the plaintiff's premises, while the enforcement of the covenant, without benefiting any one, would cause great damage to the defendant. It is a reasonable inference from the evidence that the rent roll of the defendant's land, with such dwelling houses on it as would rent to the best advantage, would not exceed \$4,500 a year, while an apartment house such as he proposes to erect would rent for over \$40,000 a year.

Nineteen of the twenty-five years which bounded the life of the covenant in question have passed, and the object of the parties in

making it has been defeated by the unexpected action of persons not under the control of the defendant. Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value to the dominant estate a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive. No injustice is done, for the damages sustained can be recovered in an action at law, and the material change of circumstances so affects the interests of the parties as to make that remedy just to both. . . .

BREWER v. MARSHALL AND CHEESEMAN.

(New Jersey Court of Chancery, 1868, 19 N. J. Eq. 537.)

The injunction in this case restrains the defendant, Marshall, from selling or removing from the farm conveyed to him by the defendant, Cheeseman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer, and move to dissolve the injunction. . . .

THE CHIEF JUSTICE. . . . George Cheeseman was originally the owner in fee of the several tracts of land now respectively owned by the appellant, Mr. Brewer, and by the respondent, Mr. Marshall; that on the 23rd day of February, 1841, he conveyed to the grantor of the appellant, the lands now held by the latter, and also, by the same instrument, another tract of twenty-eight acres, and that in this deed there was a covenant in the following words, viz.: "Also, the said George Cheeseman, his heirs or assigns, are not to sell any marl, by the road or quantity, from off his premises adjoining the above property." The tract described in this covenant as that to which the restriction was to apply, is now owned by the re-

spondent, Mr. Marshall, who, notwithstanding the covenant just quoted, has exercised, and still claims, the right to sell marl therefrom. . .

From this view of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case, which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction. The inquiry is, have courts of equity ever gone the length of enforcing contracts similar to the one now before us? . . .

But, in the second place it seems to me that this covenant, on which this suit rests, is illegal in itself, and absolutely void. The substance of this covenant is, that neither the former owner of these premises, nor his assigns, shall sell by the quantity any marl taken from these lands. This is not a restriction on the use of the land, for the marl can be dug up and used upon the land; but the restriction is on the sale of the marl after it shall have been dug up. Marl of course is an article of merchandise and the covenant restrains traffic in that article. It prohibits the sale of it at any time, in any market, either by the owner of the lands or by his assigns. Now it seems to me that this is a plain contract "against trade and traffic, and bargaining and contracting between man and man." That it is the rule that all general restraints of trade are illegal, has never been doubted since the famous opinion of Lord Macclesfield, in *Mitchel v. Reynolds*, reported in 1 P. Wms. 181. And the development of this rule, and its application under a variety of conditions, can be traced in the series of decisions which have been carefully collected and intelligently commented on in the notes to the case just cited in 1 Smith's L. C. 182. The reason upon which this rule is founded, is thus expressed by Mr. Justice Best, in *Homer v. Ashford*, 3 Bing. 326; "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." And so far has this principle been carried, that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly

held that such agreement will be void, unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other. *Horner v. Graves*, 7 Bing. 743. Tested by these principles the covenant in question appears to be destitute of all the essentials of a legal agreement. (*Ewertsen v. Gerstenberg*, 186 Ill. 344; *Curtis v. Rubin*, *supra*). The restraint it imposes is general both as to time, place, and persons. It transcends, by far, the limits of utility to the covenantee. I cannot say that this covenant is legal, any more than I can say that a covenant on the part of a farmer not to sell, nor permit any of the future owners of his farm to sell, any grain to be grown on his farm, would be legal. I think all such engagements are nugatory as opposed to the valuable rule of law just referred to, and which is designed, and is so well adapted, to promote commerce by preventing the imposition of all unnecessary trammels, either on labor or on property. In this view, I am prepared to say that the complainant's case has no legal foundation.

DR. MILES MEDICAL CO. v. PARK & SONS CO.

(United States Supreme Court, 1910, 220 U. S. 373, 394.)

MR. JUSTICE HUGHES.—The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the States respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract known as "Consignment Contract—Wholesale," has been made with over four hundred jobbers and wholesale dealers, and the other, described, as "Retail Agency Contract," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract to the injury of the other and that, in the absence of an adequate remedy at law, equitable relief will be granted. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U. S. 1; *Bitterman v. Louisville & Nashville Railroad*, 207 U. S. 205.

The principal question is as to the validity of the restrictive agreements.

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish

the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. *People v. Sheldon*, 139 N. Y. 251; *Judd v. Harrington*, 139 N. Y. 105; *People v. Milk Exchange*, 145 N. Y. 267; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; on app. 175 U. S. 211; *Montague & Co. v. Lowry*, 193 U. S. 38; *Chapin v. Brown*, 83 Iowa, 156; *Craft v. McConoughy*, 79 Illinois, 346; *W. H. Hill Co. v. Gray & Worcester*, 127 N. W. Rep. (Mich.) 803.

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic. . . .

WHITNEY v. UNION RAILWAY COMPANY.*

(Supreme Court of Massachusetts, 1858, 11 Gray 359.)

Bill in equity, filed at April term 1857, alleging that the plaintiff for forty years had been seised in fee of certain lands in Cambridge;

that she had incurred great expense in procuring a survey and plans thereof, and constructing and grading streets thereon, intending the same for private residences; that on the 10th of September 1851 she sold and conveyed by warranty deed (duly recorded) to Artemas White a lot of this land, subject to these restrictions: "That if the said Artemas White, his heirs or assigns, shall suffer any building to stand or be erected within ten feet of Lambert Avenue, or shall use or follow, or suffer any person to use or follow, upon any part thereof, the business of a taverner, or any mechanical or manufacturing, or any nauseous or offensive business whatever, then the said grantor, or any person or persons at any time hereafter, who at the time then being shall be a proprietor of any lot of land, represented upon said plan, east of lot No. 27 and north of Lambert Avenue, shall have the right, after sixty days' notice thereof, to enter upon the premises with his, her or their servants, and forcibly, if necessary, to remove therefrom any building or buildings erected or used contrary to the above restrictions, and to abate all nuisances, without being liable to any damages therefor, except such as may be wantonly and unnecessarily done."

The bill further alleged that White erected a stable on this lot, and kept horses for hire and at livery, against the remonstrance of the plaintiff, and to her nuisance and injury. . . .

The bill prayed for an injunction to restrain the defendants from erecting additional stables, or laying rails or constructing a turntable in the street, or keeping a stable for horses upon the premises, and for an abatement of these nuisances

BIGELOW, J.—The claim of the plaintiff to equitable relief rests mainly on the validity of the restrictions contained in her deed to Artemas White of September 10th 1851, under which the defendants hold the estate described in the bill. By the facts stated in the bill and admitted by the demurrer, it appears that the plaintiff was originally the owner in fee of a large tract of land, which she caused to be surveyed and laid out in lots, with suitable ways or streets affording convenient access thereto, intending to sell them to be used and occupied by private dwellings. One of these lots she sold and conveyed to White by the deed above mentioned, containing the clause as to the use and occupation of the premises, which is fully stated in the bill. This lot by mesne conveyances has become vested in the defendants. The plaintiff still continues the owner of a part of the tract originally laid out by her, and occupies a dwelling house thereon, nearly opposite to

the lot now owned by the defendants. She was therefore the original grantor by whom the restrictions were created, and, as the owner and occupier of a part of the estate out of which the land owned by the defendants was granted, and for the benefit and advantage of which the restrictions were imposed, she has a present right and interest in their enforcement. The purpose of inserting them in the deed is manifest. It was to prevent such a use of the premises by the grantee and those claiming under him, as might diminish the value of the residue of the land belonging to the grantor, or impair its eligibility as sites for private residences. That such a purpose is a legitimate one, and may be carried out, consistently with the rules of law, by reasonable and proper covenants, conditions or restrictions, cannot be doubted. Every owner of real property has the right so to deal with it, as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade. Nor can there be any doubt that in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity. . . .

But it is very clear that a suit in equity to compel a compliance with such stipulations concerning the use of property must be seasonably commenced, before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in good faith. In such cases, a prompt assertion of right is essential to a just claim for relief in equity. In the present case, the plaintiff can have no equitable relief to prevent the use or procure the abatement of the stable erected by White. Having stood by and permitted its erection, she cannot now invoke the aid of the court to enforce a remedy in equity for its re-

moval. Whether she has been guilty of further laches, so as to prevent her maintaining the bill against the defendant for acts done by them in enlarging the stable, can be determined only upon hearing the facts bearing on the question. . . .

SECTION V. CONSEQUENCES OF THE RIGHT OF SPECIFIC PERFORMANCE

LANGFORD v. PITT.

(In Chancery, 1731, 2 Peere Williams, 629.)

Upon a bill brought by the plaintiff for the performance of articles for a purchase, the case was: The plaintiff Langford, vicar of Axminster in Devon, did by attorney enter into articles with Governor Pitt for the sale of lands in Cornwall. The articles were dated November, 1725, whereby the plaintiff agreed to convey the premises to the governor and his heirs, on or before Lady Day then next, at the costs and charges of the governor, and as counsel should advise; upon the making of which conveyance the governor covenanted to pay £1500 to the plaintiff.

Governor Pitt lived until after Lady Day, but in 1722, long before the executing of these articles, made his will, by which he devised all his real estate to his son Robert Pitt for life, remainder to his eldest son John Pitt for life, remainder to his first, etc., son in tail male successively, with several remainders over, bequeathing all his personal estate to trustees to be invested in lands and settled as above; and dying soon after Lady Day, 1726, his said eldest son and heir laid claim to the premises, as descending to him, and made his will, wherein by express words he devised the premises thus articted to be purchased to his wife and others, in trust to pay his debts, etc., and soon afterwards died, leaving John Pitt his son and heir, to whom the governor

had devised all his estate expectant on the death of Robert Pitt the son. . . .

Then the question was between the defendants, whether the devisees of Robert Pitt the son, or the grandson under the will of the governor, were entitled to the lands thus articulated to be purchased, for it was agreed that the purchase-money was to be paid by the executors of Governor Pitt.

And for the latter it was objected by the attorney and Solicitor-General, that when the governor by his will devised all his real, and also his personal estate to be laid out in land and all this to be for the benefit of his grandson John, after the death of his son Robert Pitt, either in one shape or other, these lands thus agreed to be purchased by the governor should pass; that nothing could be plainer than his intention to dispose of all his estate both real and personal; and Mr. Solicitor cited the case of *Greenhill v. Greenhill*, 2 Vern. 679, by which it is decreed that were a man articles to buy land, this gives the party contracting an equitable interest in such land, which he may devise, though before the day on which the conveyance is to be made.

MASTER OF THE ROLLS. I admit the case of *Greenhill* and *Greenhill*, in which I myself was of counsel, to have been so determined; but this material difference is observable between the two cases: there the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but in the present case Governor Pitt's will was made prior to the articles for this purchase, before he had any equitable interest in the land, consequently (*Vide Green v. Smith*, 1 Atk. 572; *Potter v. Potter*, 1 Ves. 437) when he had no kind of title, he could devise nothing; so that this interest in the premises gained by the governor's articles must have descended to his son Robert Pitt as heir-at-law, who might well devise the same; and though it may at first look strange, that when the governor devised all his real and personal estate, these words should not carry all, yet it will not seem strange, when it is considered that an estate purchased after the will cannot pass thereby; now these articles are as a purchase subsequent, and though the governor's executors are to pay for such purchase, they cannot have the benefit of it, being to advance the money only as a debt from their testator. . . .

COLES v. FEENEY.

(New Jersey Court of Chancery, 1894, 52 N. J. Eq. 493, 29 Atl. 172.)

The bill is brought for the specific performance of a contract for the sale of land by the testatrix to the defendant Feeney, on the 26th of December, 1891, by which the testatrix, in consideration of \$3,000, agreed to convey to the defendant Feeney, a tract of land in Jersey City, of which she was the owner, the conveyance to be completed on the 26th of January, 1892. The contract was signed by each of the parties.

Three days after the date of this agreement Mrs. Coles died testate of a will, by the first item of which she devised "so much of my real estate situate in Jersey City in the State of New Jersey derived by be from my son William F. Coles lately deceased as at my decease *shall remain unsold* and shall not then be improved by dwelling-houses or other buildings." This devise covers the land covered by the contract. . . .

The bill alleges that shortly after the will was proven the executors tendered a deed to Mr. Feeney for the tract of land in question and demanded payment of the purchase-money, and that he declined, not on the ground that the deed was not tendered at the time fixed by the contract, but because the executors were unable to give a perfect title.

The defendant Feeney answers, and bases his refusal to complete the purchase solely on the ground of the inability of the executors to make a complete title in the absence of the devisees of the lot in question, who, being numerous, were not made parties. . . .

PITNEY, V. C.—I do not think the rights of the parties turn upon the question, so much discussed in the briefs, whether or not the land in question "remained unsold" at the decease of the testatrix, and because sold was not devised by her under the first item of her will, or whether she "died seized" of it in such sense as to bring it within the scope of the power of sale contained in the thirteenth item.

If this contract of sale was a valid contract, its effect was to work a conversion of the land from real to personal property. This it was in the power of the testatrix to do, notwithstanding her will, which was made before the date of the contract. Such conversion, if made, had the effect of taking the land out from under the operation

of the first clause of her will and giving the proceeds of it to her residuary legatees and devisees as a part of her personal estate, and, in the absence of any power of sale, it seems to me entirely clear that the executors would have the right, and it would be their duty, to take proper proceedings to perfect the conversion by compelling the transfer of the legal title to the purchaser and obtaining from him the purchase-money. *Miller v. Miller*, 10 C. E. Gr. 354. In contemplation of equity, the title to the property vested in the purchaser as soon as the contract was executed and delivered, subject, however, to a lien in favor of Mrs. Coles for the unpaid purchase-money, and that lien is capable of being enforced by her executors against the specific devisees of the particular land, even in the absence of any power of sale, by compelling them to convey to the purchaser and compelling the purchaser to pay to the executors the purchase-money.

This right of the personal representatives depends entirely upon the validity of the contract, and in order to enforce such right they must establish its validity as against either the heir-at-law or devisee, as the case may be. . . .

This view of the case shows that the bill is defective in not making parties the several devisees under the first clause of the will. If they had been made parties I should say the executors were entitled to relief. But it is manifestly unjust, and not in accordance with equity, to ask the purchaser to take a title the validity of which depends upon a nice question of construction, when it is within the power of the executors to eliminate all question and room for debate by making the specific devisees parties.

The case may stand over, to enable the executors to bring in those devisees if they shall be so advised. Otherwise, I will advise that the bill be dismissed.

ROBERTS v. MARCHANT.

(High Court of Chancery, 1843, 1 Phillips 370.)

THE LORD CHANCELLOR. This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The Defendant by his answer

objected that the heir-at-law of the vendor ought to have been a party to the suit. The Vice-Chancellor Wigram allowed the objection. This is an appeal from that decision.

It was argued that by the contract the estate was converted into personalty, and that the heir-at-law had no interest in the matter. But that is to assume the very point in controversy, for the heir-at-law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract; but that rule does not extend to representatives; and the heir-at-law is the representative of the vendor as to the realty. . . .

POTTER v. ELLICE.

(New York Court of Appeals, 1872, 48 N. Y. 321.)

This is an action against the heirs of a vendor, to compel the specific conveyance of land. The executors of the deceased vendor are not made parties. . . .

At the close of the testimony, the defendant's attorney "moved to dismiss the complaint, on the ground that the said Charles R. Westbrook and John Rossell were not made parties to the action." The motion was denied by the referee, who rendered judgment for the plaintiff to the effect that the property be conveyed by the defendant to the plaintiff; that the money paid into court by the plaintiff (upon a tender) remain until the delivery and execution of the said deed to the plaintiff, and that then the same be paid to the administrator of Ellice, upon application for the same to the court.

HUNT, C. It is difficult to say that this action is well brought, the administrators of Mr. Ellice not being made parties. The heir of Mr. Ellice holds the legal title, in trust, to convey the same to the vendee upon performance of the conditions of the contract. He is a mere instrument, having no real interest in the matter in a case where the contract is performed. The administrators are the real parties in interest. Both by the statute and the common law the interest in the contract passes to them. They are the parties to whom he money

is to be paid, and who have the entire beneficial interest in the contract. Their discharge or receipt is a necessary muniment to the vendee. They are the parties not only who receive, but who are to settle or to contest, as the case may be, the amount to be paid by the vendee in fulfillment of his contract. No one else can legally adjust the amount to be paid, or acquit for the payment. (2 R. S. 83; *id.*, 194, No. 169; *Havens v. Patterson*, 43 N. Y., 221; *Lewis v. Smith*, 5 Seld., 502, 510; 1 Sug. on Vend., 264; *Calvert on Parties in Eq.*, 327). The administrators are parties, without whose action some of the most important points cannot be determined. Among these are the existence of the contract and the amount to be paid in fulfillment of its terms. Admitting these general rules, the court below supposed that reasons existed why they should not control the present case. Among other things, it is said that the personal representatives of the vendor were tendered the amount claimed to be due upon the contract, according to their own statement of the amount due. How has this been established, and by whom? By witnesses in a suit to which the administrators were not parties. This is a loose rule, by which the parties are to be bound, and their rights cut off by testimony in suits to which they are not parties, and in which they have no opportunity to establish their rights. . . .

COOPER v. JARMAN.

(Equity Cases before the Master of the Rolls, 1866, L. R. 3 Eq. Cas. 98.)

On the 12th of October, 1863, the intestate had entered into a contract with Messrs. James and Robert Lawrence, for the erection, by them, of a house on a piece of freehold land belonging to him. The house was in course of erection, but not finished at the time of his death; it had since been finished, and Joseph Charles Jarman had paid £799.19s. out of the personal estate of the intestate to Messrs. Lawrence for the completion of the contract by them. The question now raised was, whether the payment of this sum ought to be allowed to Joseph Charles Jarman, as the legal personal representative of the intestate. . . .

LORD ROMILLY, M. R., after stating the facts, continued: The next of kin contend that this sum ought not to be allowed and that the heir-at-law must personally bear the expense of completing the house. The ground on which this is insisted on by the next of kin, is, that the contract was of such a character that the specific performance of it could not have been enforced against the intestate if he had thought fit to resist it, and that if he had done so, and had in the middle stopped the further building of the house, the only remedy which Messrs. Lawrence could have had against him would have been by an action for damages sustained by them by the breach of contract by the intestate. There can not, however, be any question but that the administrator would have been liable, in an action brought by the Messrs. Lawrence, if he had refused to allow them to complete the contract. . . . I think it cannot be good law that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate. There is, as it appears to me, a wide distinction between the case of this description and the case of a contract for the purchase of a piece of land. In that case, the personal estate of the intestate, or testator, is bound to pay the purchase-money, provided a good title can be made; but if a good title cannot be made, then there is no contract, and no action would lie against the representatives of the intestate, because the contract, in the absence of any express stipulation, necessarily is inferred to have been to buy land with a good title; and if the deceased person had contracted to buy land with any particular title, in a manner to bind him, this contract would bind the personal estate in the hands of the next of kin. But I have seen no case, and I am unable to believe that any case can be found, where a legal personal representative has been made answerable for performing a contract entered into by the deceased person, and at the time of his death intended to be performed by him, merely because, according to the peculiar rules of equity relating to the doctrine of specific performance, such a contract could not have been enforced by a suit in equity against the deceased person, or against his representative. Here, unquestionably, the intestate had bound himself, as far as possible, during his lifetime. The house had been begun; the building was in progress when he died. If the

Messrs. Lawrence had, therefore, refused to go on with the building, an action would have lain against them at the suit of the administrator; and it cannot, in my opinion, be law, that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. Lawrence, and hinder them from coming on the land, and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfillment of the contract. Besides which, if I am so to hold, no rule could be adopted which would be certain. The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by the breach of the contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed; and if he resisted, and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit, should exceed the amount to be paid for the completion of the contract, could the legal personal representative be allowed to deduct this in taking the accounts? I apprehend clearly not. The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty. I am, therefore, of opinion that this sum has been properly allowed in the accounts of the administrator.

SPRAKE v. DAY.

(Supreme Court of Judicature, 1898, 2 Ch. Div. 510.)

The testator, by his will, dated June 2, 1893, appointed the plaintiffs and the defendant H. J. Sprake, to be executors and trustees thereof. And he devised his dwelling-house known as Weston Manor House, together with the stables etc., thereto belonging, and certain closes of land adjoining, to the use of Elizabeth Louisa Sprake-Day during her life, and after her decease to the use of her daughter Alice Maud Day (the other defendant) during her life. . . .

In May, 1893, the testator entered into a contract with some

builders for the erection of some cottages upon a part of the property thus devised to Mrs. Sprake-Day and her daughter. The testator had also entered into another contract with the builders for the erection of a house on some land situate at a place called Misterton which belonged to Mrs. Sprake-Day, it having been conveyed to her absolutely at his instance during his lifetime. At the time of the testator's death neither of these contracts had been completed, and after his death the builders were not allowed by the plaintiffs to finish the work. . . .

NORTH, J. As regards the property which was devised by the testator for the benefit of Mrs. Sprake-Day and her daughter, and which was the subject of a contract for building existing at the time of his death, I think a case is made for an inquiry, because it seems to me that *Cooper v. Jarman* applies. It is said that that case stands by itself; but although, so far as I know, there has been no other case which supports it, on the other hand there is none against it, and it lays down an intelligible principle. It has been unreversed for a great many years, and though no doubt the point is one which does not often arise, still there the case stands, and I must follow it, but I do not think it applies to the Misterton property which was not given by the testator's will. That property had at some time before his death been conveyed direct to Mrs. Sprake-Day at his instance. Then the testator entered into a contract for the building of four cottages upon this land. This contract has not been completed, but the person entitled to the benefit of it has carried in a claim against the testator's estate, and it appears from the chief clerk's note that a certain sum has been allowed. I do not see that any claim has been made by Mrs. Sprake-Day in respect of this property. The property was conveyed to her out and out, and the testator entered into some contract with respect to it, but whether under such circumstances that she could have compelled him to carry out the contract I do not know. I can understand that there might be circumstances under which he would have been bound to carry out such a contract, by reason of some consideration moving from her to him to induce him to undertake the liability. But the evidence which has been adduced does not establish any liability of that kind, and I do not see how a person who for this purpose is a stranger—the owner of the property before the testator's death and not taking it under his will—can claim to have a contract entered into by the testator with a builder

to erect houses upon it carried out. Under these circumstances I can only direct an inquiry whether the testator had entered into any and what building contracts or contract affecting the property devised to Mrs. Sprake-Day for her life, with remainders over, and whether any and which of such contracts were uncompleted at his death in respect of which his estate was under any and what liability, and whether any and what compensation should be paid by the testator's estate in respect thereof.

NEWTON v. NEWTON.

(Rhode Island Supreme Court, 1876, 11 R. I. 390.)

DURFEE, C. J. This is a motion for leave to amend a bill in equity. The bill is brought by the widow and children of William Newton, late of Newport, deceased, against Edward F. Newton, administrator upon his estate. The bill sets forth that on the 4th day of February, 1847, William Newton conveyed to the defendant for \$2,000, one undivided half part of a certain lot of land in Newport, and that on the 13th day of February, 1858, said William Newton conveyed to the defendant for \$1,500 one undivided half part of a certain other lot of land in Newport. The bill further sets forth that there was among the personal property of William Newton which came into the hands of the defendant, in his capacity as administrator as aforesaid, as the plaintiffs have recently been informed, a certain bond or writing obligatory, executed by the defendant and delivered to William Newton, the purport of which was as follows, to wit: It recites the sales above mentioned, and binds the defendant under a penalty of \$4,000 to fulfill an agreement by which he grants "the privilege to the said William Newton at any time, at his own option, for or within the term of seven years from the present date, to purchase the whole of said two estates for the sum of eight thousand dollars." . . .

If the administrator should purchase under the option, he should doubtless purchase for and in the name of the heirs at law, the property being real estate. In this state, where the next of kin and the heirs at law are generally the same persons, and where the real and personal estate is equally liable for debts, such a change in the form of the

assets, if wisely made, would be of small importance. But to test the power of the administrator, we may inquire what the result would be at common law. At common law the next of kin and the heirs at law are often not the same, and real estate is not liable to the same extent as personal property for debts; and therefore to concede to the administrator the power to accept the option would be to concede to him the power, to the extent of the option, to change the succession to the property, and to qualify its liability for the debts of the intestate. We think there is no principle on which this could be permitted. Moreover, in the case at bar, the administrator, to have accepted the option, would have had not only to pay \$8,000, but also to exonerate the maker of the bond from partnership losses and liabilities. Neither the bill nor the proposed amendment offers to fulfill this condition, or shows that it was ever within the power of the administrator to fulfill it. Certainly the administrator had no power to bind the estate to such an exoneration by any contract of indemnity, if that was required for the fulfillment of the conditions. Such a contract would have been beyond his capacity as administrator. . . .

LAWES v. BENNETT.

(In Chancery, 1785, 1 Cox 167.)

Thomas Witterwonge, seized in fee of a farm called Bently, by indenture, dated 2nd October, 1758, demised the said farm to John St. Leger Douglas, Esquire, his executors, administrators, and assigns, for seven years under the yearly rent of £106 14s. 6d. and upon the back of the said indenture, was indorsed a memorandum or agreement signed by Witterwonge and Douglas bearing even date with the said indenture, whereby it was agreed by and between the said Witterwonge and Douglas, that in case Douglas should at any time after the 29th of September 1761, and before the 29th of September 1765, be desirous of absolutely purchasing the fee simple and inheritance of the said premises, mentioned in the said indenture, for the sum of £3000 to be paid by him to the said Witterwonge at the execution of the conveyance thereof, and of such his mind and intention should

give notice in writing to the said Witterwonge before the 29th September 1765, then Witterwonge agreed to sell to Douglas the fee simple and inheritance of the said premises for the said sum of £3000 and to execute proper conveyances thereof.

Thomas Witterwonge, by his will dated 1st September 1761, devised all his real estates of which he was seized or entitled to, unto his cousin John Bennett, and he thereby gave and bequeathed his personal estate to the said John Bennett, and to the plaintiff Mary, sister of the said John Bennett (after payment of his debts and legacies) to be divided equally share and share alike, and appointed John Bennett and plaintiff Mary joint executors.

Testator died in June 1763, and on 11th February 1764, John Bennett settled an account with plaintiff Mary, of all the testator's personal estate, and paid her £324 6s. 3d. as her moiety thereof, and the account was signed and allowed by both of them.

By deed poll, dated 2d of March 1762, made between the said John St. Leger Douglas of the one part, and William Waller Esquire of the other part, after reciting the said lease of 1758, and the memorandum or agreement thereon indorsed, the said John St. Leger Douglas, for the consideration therein mentioned, assigned the said premises and all his interest therein, and all benefit and advantage which should or might arise from the said agreement to the said William Waller, his executors, administrators, or assigns, for all the residue of the term then to come therein.

On the 2d February 1765, William Waller called upon John Bennett to perform the contract entered into by the testator for sale of the premises for £3000, which Bennett complied with, and accordingly by indentures of lease and release, dated 1st and 2d of February 1765, in pursuance and performance of the said agreement, so indorsed upon the said indenture of 1758, and in consideration of £3000 the said John Bennett did bargain, sell, etc. the said premises to the said William Waller, his heirs and assigns for ever.

In 1779 John Bennett died, leaving defendant his widow and executrix; and the present bill was filed by Thomas Lawes and Mary his wife (sister of the said John Bennett), stating, that they had not until lately discovered the sale of the estate to Waller, and claiming one moiety of the purchase money received by Bennett, as being part of the personal estate of the testator Witterwonge, and which he had

devised equally to Bennett and plaintiff Mary. And this was the single question in the cause, whether the premises being part of the testator's real estate at the time of his death, but sold afterwards under the circumstances aforesaid, the purchase money should be considered as part of the real or personal estate of the testator. . . .

MASTER OF THE ROLLS. Although this case may be new in species, yet the principles upon which it seems to me to depend are perfectly clear, and are so well established in this court, that if I am wrong it must be by misapplication of those principles. No stress can be laid upon the will of Witterwonge, for that is expressed in very general terms. He had two species of property, one of which gives to Bennett, the other to Bennett and his sister. Then which kind of property is the present? It is very clear that if a man seized of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not; (as to what has been said about Douglas' being able to release his power of election, I think a court of equity would relieve against that, if it appeared to be done collusively to oust the legatee of his personal estate;) when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. The case of *Bowes v. Lord Shrewsbury*, 5 Bro. Parl. Ca. 269, shows the nature of the property may be altered otherwise than by the act of the original owner, although that was altered by the act of the legislature and not of any third person: but it shows generally that there is no impossibility in the nature of the thing. As to the length of time, I think I can take no notice of it in this case, for here there is no pretense to presume the demand satisfied. On the contrary, it has been withholden for another reason. I must therefore declare this £3000 to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof, and the Master must inquire whether the plaintiff Thomas has

made any, and what settlement on the plaintiff Mary, etc. And as to interest, as it appears that Bennet laid out this money in the funds, and consequently has made interest of it; he must be answerable for interest, from 1st February, at 4 per cent. . . .

BAILEY AND WIFE v. DUNCAN'S REPRESENTATIVES.

(Kentucky Court of Appeals, 1827, 4 Monroe, 256.)

OWSLEY, J. . . . We have already seen that Isaac Duncan, the husband, resided upon the land at the time of his decease, and that as respects the present contest, it is not competent for Bailey and his wife, who claim under his purchase, to contest the goodness of his equity, so that in deciding upon the widow's right to dower, the question arises whether or not a wife is entitled to dower in land, of which her husband dies possessed, though without having the legal title, but to which at the time of his death he is equitably entitled to a conveyance of the legal title from another?

Were this question to be decided upon common law principles, the answer would undoubtedly be in the negative. As early as *Vernon's case*, 4 Co. R. 1, it was held that a wife was not dowable of a use before the statute of uses; and since the statute, uses or trusts not executed by the statute have been repeatedly held not to give the wife a greater interest than uses at common law.

In the case of *Bottomley v. Lord Fairfax*, Prec. Ch. 336, the court say, "that if a husband before marriage conveys his estate to trustees and their heirs, in such a manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate, the wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such a case."

In the case of *Chaplin v. Chaplin*, 3 Peere Wm. R., the chancellor says, "that as at common law, an use was the same as a trust is now, it follows, that the wife can no more be endowed of a trust now, than at common law, and before the statute, she could be endowed of an use."

And in the case of *Godwin v. Winsmore*, 2 Atkins, 526, Lord Hardwicke observes, that "it is an established doctrine now that a

wife is not dowable of a trust estate; indeed, says he, "a distinction is taken by Sir Joseph Jekyll, in *Banks v. Sutton*, 2 P. W. 708, 709, in regard to a trust where it descends or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction, for it is going on suppositions which hold on both sides."

Thus stood the doctrine of the law upon the subject of estates in trust, until the passage of an act by the legislature of Virginia before the separation, and which has since been reenacted by the legislature of this state, and is contained in 1 Dig. L. K. 315.

The act provides, that, "where any person to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements or hereditaments, hath or shall have such inheritance in the use or trust, as if it had been a legal right, the husband or wife of such person would thereof have been entitled to courtesy or dower, such husband or wife shall have and hold, and may by the remedy proper in similar cases, recover courtesy or dower of such lands, tenements, or herditaments."

With respect to uses and trusts embraced by the provisions of this act, the doctrine of the common law has undoubtedly undergone a change, and although formerly a wife was not dowable of such a use or trust, she may now by the remedy proper in such a case, recover dower of the lands to which others are seized to the use, or in trust for the benefit of the husband. In deciding upon the question under consideration therefore, the main and only inquiry for the court, is to ascertain whether or not it was intended by the makers of the act, to authorize a wife to recover dower in lands, to which the husband had at his death an indisputable right in equity to a conveyance of the fee simple estate, though the right be devised under an executory contract for the title, and not resulting from an use or trust, expressly declared by deed. With respect to trusts of the latter sort, the provisions of the act are too explicit, in favor of the wife's right, to admit of a difference of opinion; and if we advert, as we should do, to the old law as it stood at the passage of the act, the mischief which must have actuated the legislature in making the change, and the remedy which the act has provided, we apprehend, but little doubt will be entertained as to the propriety of giving such a construction to the act, as will embrace all trusts, whether expressly declared by

deed or resulting from executory contracts, by construction of courts of equity. The interests of the cestui que trust is precisely the same, let the trust be created in the one way or the other, the justice of the wife's claim is as strong in one case as the other; and, as she was not dowable in a trust of either sort, before the enactment of the statute, the mischief to be remedied by the act, emphatically demands that the wife should be endowed of trust estates of both sorts.

We have been unable to find any case, either in this country or Virginia, where dower has been decreed to the wife, in an equitable estate in fee, to which the husband became entitled by contract, for a conveyance of the land; but the right of the wife to dower in such a case came before the appellate court of the state of Virginia, in the case of *Rawton v. Rawton*, 1 H. M. R. 92, and although a majority of the court decided against the claim of dower in that case, two out of the five judges composing the court, were expressly in favor of the claim for dower; and the decision of the others went not upon the idea of dower not being allowed in an equitable estate, but upon the principle that the equitable estate, of which dower was claimed, was not made out by the testimony in the cause. And in the case of *Claibourn v. Claibourn*, which afterward came before the same court, Judge Roane, who was one of the judges that decided against the widow's claim of dower in the former case, in remarking upon that case, after stating its circumstances, says, "the transaction having happened subsequent to the act of 1785" (the act of which the act of this country is a transcript), "the widow claimed her dower only under the provision of that statute. Three of the judges overruled her claim; but it was on the ground of no contract having been proved, as they thought, for more than a life estate, in favor of the husband: two other judges thought that the husband had an equitable estate in fee, and on that ground were in favor of the dower, under the act of 1785." In the course of his remarks he further says, "the counsel in opposition to the claim of dower, admitted that under the act of 1785, the widow was entitled to dower, provided it should appear that her husband had such an equity in a fee simple estate, as would authorize a court of equity to decree the legal estate." Thus it seems to have been the concurrent opinion of the bar and the bench of the supreme court of Virginia, that since the act of 1785, of which ours is a copy, that a wife is dowable, of any equity in a fee simple estate, belonging to

the husband, if it will authorize a court of equity to decree the legal title. . . .

HAMPSON v. EDELEN.

(Maryland Court of Appeals, 1807, 2 Harris & J. 64.)

CHASE, C. J. In this case it appears that a considerable part of the purchase money was paid, and possession given of the land, prior to the obtention of the judgments by Hampson against Wade.

A contract for land *bona fide* made for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused.

A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means.

BLOCK v. MORRISON.

(Supreme Court of Missouri, 1892, 112 Mo. 343, 20 S. W. 340.)

BLACK, J. . . . The deed from Easton to Hammond states that it was made in consideration of \$1,583, paid by Hammond, and pursuant to the considerations of a certain bond executed by Easton to Hammond and Wilkinson, dated the third of September, 1818. Hammond, therefore, held a title bond for the conveyance of the land as far back as 1818, which was before the date of the judgment under which

the property was sold. Did this title bond create in the vendee an interest in the land which was subject to sale under execution? The answer must be in the affirmative. The statute in force at that time provides that the sheriff's deed "shall be effectual for passing to the purchaser all the estate and interest which the debtor had or might lawfully part with in the lands at the time judgment was obtained." 1 Territorial Laws, 120, sec. 45.

In *Brant v. Robertson*, 16 Mo. 129, this court said: "When parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser, and the case is the stronger when the purchaser has actually paid in whole or in part; and in either case, the interest of the purchaser may be sold on execution, upon the principle that the vendor is to be regarded as seized in equity to the use of the purchaser. But if no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seizin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him which is liable to sale on execution." It is true the statute then in force made "all real estate, whereof the defendant, or any person for his use, was seized in law or equity," subject to sale on execution; and "real estate" was defined to be "all estate and interest in lands, tenements and hereditaments." The words of the statute then in force were different from the words of the statute now in question, but there is no substantial difference in their meaning. The statute now in question makes any interest in land which the debtor may sell subject to sale under execution. That a title bond for the conveyance of land gives the vendee an interest which he may sell cannot be doubted. The principle of law is well settled that, where there has been a contract for the sale of land, the vendor becomes the trustee of the land for the vendee, and that the vendee has an interest in the land which may be sold under execution. *Papin v. Massey*, 27 Mo. 445; *Hart v. Logan*, 49 Mo. 47; *Morgan v. Bouse*, 53 Mo. 219. In some of these cases the vendee had been put in possession, and in others the whole or a part of the purchase money had been paid; these circumstances may make out a stronger case, but the principle still stands, that the vendee in a title bond has an interest in the land which he may sell, and which he may enforce by specific performance, and which is subject to sale under execution. . . .

HELLREIGEL v. MANNING

(New York Court of Appeals, 1884, 97 N. Y. 56.)

EARL, J.—This action was brought by the plaintiff to compel the defendant to specifically perform a contract for the purchase of land. . . .

Upon the trial, the counsel for the defendant offered as follows: "To prove that during the four years of the running of the contract in question, the buildings on the premises have never been painted, although they required painting; that they have been suffered to become dilapidated for want of painting, that Mr. Hellreigel has allowed them to run down; that he has realized every thing from the buildings without paying out anything on them for repairs; to show that he has permitted the sewers to be stopped up; that the cellars are filled with water to the depth of two feet and upward; that the gates have been broken off the hinges; that the sidewalks have been permitted to become out of repair, and dangerous for the people passing over it," and that, in consequence of all these, the building had depreciated in value to the extent of several hundred dollars. There was no allegation in the answer nor offer to prove that the plaintiff had done anything intentionally or willfully to damage the buildings or depreciate their value. The deterioration in the condition of the buildings seems to have been due to natural causes, and the ordinary use of them. It is not claimed that there is anything in the language of the contract which required the plaintiff to keep the premises in repair, and hence his conduct in reference to them must have been such that it would be inequitable and unjust for a court of equity to enforce the contract in his favor. There was no allegation in the answer, and no proof that the premises were not worth the sum which the defendant agreed to pay for them. There was no proof, or offer to prove, that the plaintiff had realized more than a fair interest upon his investment from the rent of the premises, and hence that he put into his pocket what he might well have expended in keeping the premises in good repair. We do not perceive that, under the circumstances, he owed the defendant any duty to keep the premises in repair. A party agreeing to sell and convey

premises at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair, or to guard against the decay which is due to time and ordinary use. Circumstances might occur which would impose such a duty upon the vendor; but they do not exist in this case, and were not offered to be proved. . . .

BLEW v. McCLELLAND.

(Missouri Supreme Court, 1860, 29 Mo. 304.)

NAPTON, J. On the 8th of November, 1856, Blew, the plaintiff, made a verbal contract with McClelland for the purchase of a lot in the town of Princeton, Mercer county, on which there was a tavern and other buildings. The improvements constituted the principal value of the property. The price agreed on was \$1,550, five hundred of which was paid down. McClelland was to execute on the same day, or the Monday following, a title bond for a conveyance of the title when the purchase money was paid, and Blew was to give his notes for the balance of the purchase money. On Sunday, the 9th of November, the buildings were all destroyed by fire. Nothing further was done; the title bond, although tendered, was never received, and the notes for \$1,050 were not executed. McClelland had a policy of insurance on the premises for eight hundred dollars, which he collected from the company, representing himself as the owner, and which in his answer he offers to treat as a liquidation of the purchase money, *pro tanto*. This suit is brought by Blew to recover the five hundred dollars purchase money advanced, and the only question presented by the record is whether, under these circumstances, the action will lie.

The case of *Paine v. Meller*, 6 Ves. 349, is understood to have determined that, where there is a contract for the sale of a house, and before a conveyance the house is burned down, the loss falls on the purchaser, and the purchaser is still bound to execute his agreement to pay the purchase money. This does not appear to have been the opinion of the Master of the Rolls in *Stout v. Bailey*, 2 P. Wms. 220, who thought, in such a case, the purchaser would not be bound. But Sir Edward Sugden seems to regard the decision of Lord Eldon, in

Paine v. Meller, as the true exposition of the law. It is based upon the doctrine that equity regards as done what has been agreed to be done, and therefore, after a valid agreement to purchase, looks upon the purchaser as the owner. Hence Sir Edward Sugden declares the law to be that a vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to the benefit which may accrue to the estate in the interim." (1 Sugden on Vendors, 277).

The principle has, in England, been carried to the extent of holding that, where an agreement was made for the purchase of an estate, in consideration of an annuity for life to the vendor, and he dies before the conveyance and before the annuity becomes due, the contract will still be specifically enforced. (*Mortimer v. Cupper*, 1 Bro. C. C. 156; *Jackson v. Lever and others*, 3 Bro. C. C. 605).

But the maxim of courts of equity, that whatever is agreed to be done is considered as actually performed, is confined to cases where the contract or agreement is a valid one and can be enforced. If the contract, by reason of its being by parol, is one which neither a court of equity or of law can enforce, and nothing has been done to withdraw it from the operation of the statute of frauds, the title remains as it was, both in law and equity, unaffected by the parol agreement; and whatever accidental losses the property may sustain must of course fall upon the owner. In such a case, it is clear that if, after the parol agreement to purchase, a valuable gold mine was found upon the premises, the purchaser could not compel a specific performance, unless there had been a change of possession or some other circumstance which courts have determined sufficient to take a case out of the statute. Neither ought he to be compelled to pay his purchase money, when a fire has destroyed the buildings which formed the principal inducement for the purchase. It would be very inequitable to adopt a rule which would not operate alike on vendor and vendee, which would leave it to the option of one to enforce the contract or not, as it might promote his interest or caprice. The case of *McGowan v. West*, 7 Mo. 569, was a case where the purchaser had taken possession, and by reason of that circumstance could have enforced a conveyance notwithstanding the contract was by parol. This court would not permit him to hold on to the land, and set up, as a defense to a

suit upon his note for the purchase money, that the contract was a parol one. In the present case, there was no change of possession, and there was no other circumstance which would have enabled the plaintiff to enforce a specific performance of the contract had the estate, instead of being almost rendered valueless, been unexpectedly increased in value. As the contract could not be enforced by the purchaser, it would be unjust to enforce it against him. (*Cunnutt v. Roberts*, 11 B. Monr. 42). . . .

COMBS v. FISHER.

(Kentucky Court of Appeals, 1813, 6 Ky. 51.)

Combs being the owner of a tract of land, with a cabin and other improvements thereon, on the 10th day of January, 1806, sold the same to Fisher, and promised to deliver possession thereof to Fisher, in the same situation it then was, against the first day of January next thereafter. To recover the amount of an obligation executed by Fisher in part pay for the land and improvements, Combs prosecuted suit and obtained judgment in the Casey Circuit Court. For the purpose of obtaining relief against that judgment, Fisher exhibited his bill in chancery, alleging the purchase of the land and improvements aforesaid, the promise of Combs to deliver possession in the same situation it was when the purchase was made, etc., and charges that the place was not delivered in that situation, but that the cabin was burned and a number of rails destroyed, etc. He prayed and obtained an injunction on the judgment at law, and asked for general relief. The injunction was dissolved; but on a final hearing of the cause, the Circuit Court decreed compensation for the cabin and the rails, the value whereof was ascertained by the verdict of a jury. From which decree this writ of error has been prosecuted. We think the decree of the Circuit Court correct. The evidence in the case satisfactorily proves the promise on the part of Combs to deliver possession of the place in the same situation it was when Fisher purchased, and that the cabin was burned and rails destroyed before possession was delivered. Combs' express promise, therefore, should be binding on him. The circumstance of the cabin having been burnt by accident, as is urged by

Combs, cannot relieve him from his express understanding. For wherever the covenant is express, there must be an absolute performance, nor can it be discharged by any collateral matter whatever—*Esp. N. P. 270*. The objection to the smallness of the amount in controversy we think not entitled to any weight. The cause was finally tried on the bill, answer, etc. No objections were taken to the jurisdiction by plea in abatement, nor does any exist on the face of the bill; upon such a state of pleadings, no objection to the jurisdiction can be maintained on the final hearing of the cause.

DECREE AFFIRMED.

EDWARDS v. WEST.

(In Chancery, 1878, L. R. 7 Ch. D. 858.)

FRY, J. The plaintiffs in this case allege that the option of purchase which was given by the lease of the 29th of September, 1870, to be exercised by a notice given on or before the 25th of March, 1875, and to be carried into completion on or before the 29th of September, 1875, was enlarged by subsequent correspondence, that by virtue of that correspondence a new contract was constituted under which the 29th of September, 1876, was substituted for the 25th of March, 1875, and that the option was exercised on the 28th of September.

I will assume, for the purpose of the present judgment, that the Plaintiffs are correct in that contention. There are, therefore, four dates material to consider; first, that of the contract creating the option; secondly, that of the injury to the premises; thirdly, that for the exercise of the option; and fourthly, that for the completion of the purchase according to that option.

Now the point which I am about to decide arises from the payment of a sum of between £11,000 and £12,000 by the insurance offices to the Defendant consequent upon the injury to the property by fire on the 6th of May, 1876. The Plaintiffs contend that that money so received by the Defendant was received by him as part-payment of the £14,000, which the Plaintiffs, under the option, were bound to pay; and that contention has been supported by three methods of argument.

In the first place, it has been said that by the law of England, the exercise of the option causes it to relate back to the time of the creation of the option in such a matter as to render the property for this purpose property of the purchaser as from the date of the contract which gave the option; so that here, although the option was given by a contract made in April, and not exercised till the 28th of September, yet that when it was so exercised on the 28th of September, it operated retrospectively, and made the property the property of the purchaser as from the month of April preceding, and consequently made the vendor trustee of the fruits of the property for the purchaser. Now it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligations which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconvenient. . . .

Upon that general principle, then, I should hold that the argument is untenable. But, then I am told that the case is covered by authority, and for that purpose my attention is very properly drawn to the cases which began with *Lawes v. Bennett*, 1 Cox, 167, and which shew that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the produce of the sale goes as part of his personal estate, and not as part of his real estate. Now, whether *Lawes v. Bennett* is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one Judge as somewhat difficult of explanation. I think that the language of Lord Eldon in *Townley v. Bedwell*, 14 Ves. 591, and of Vice-Chancellor Kindersley in *Collingwood v. Rew*, 3 Jur. (N. S.) 785, shows that they were not satisfied that that case was consistent with the general principles which were applicable to cases of conversion; and therefore, although I should implicitly follow *Lawes v. Bennett* in a case between the real and personal representatives of the person who granted the option, I do not think that I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor and the purchaser who claim under it. It is to be borne in mind that no authority can be produced which has ex-

tended the doctrine of *Lawes v. Bennett* in the slightest degree beyond what was decided in that case. The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I for one shall not extend it, because I think that it is limited by the general principle to which I have adverted. Therefore, upon that ground, I hold that there is no conversion of the estate from an earlier date than the 28th of September, when the notice was given. The fire having taken place, and the insurance money having been received at an earlier date, the intended purchaser has no right, upon the general principles of conversion, to assert a title to that money. . . .

SECTION VI. PARTIAL PERFORMANCE WITH COMPENSATION.

O'KANE v. KISER.

(Indiana Supreme Court, 1865, 25 Ind. 168.)

FRAZER, C. J. . . . The payment of the money and the conveyance of an unincumbered title were dependent acts, and, at law, there could be no recovery unless such a title was offered on the day. *McCulloch v. Dawson*, 1 Ind. 413. It follows that in the present case, the suit on the note can only be sustained, if at all, as being in equity to compel a specific performance, time not being regarded in equity as so strictly of the essence of the contract. But one who comes into equity seeking to compel a specific performance must show that he has performed, or offered to perform, the acts on his part to be performed, which constituted the consideration of the contract which he asks the court to compel the other party to perform. This is thoroughly settled by the authorities, acting upon the maxim that "he who seeks equity must do equity." It is also in entire harmony with the principles of justice and honesty. The purchaser here agreed to pay his money for an unincumbered title, not for the mere covenant of the vendor against in-

cumbrances. He purchased the land, not the vendor's contract, and having contracted for the former unincumbered, a court of equity will not compel him to take it with on unpaid mortgage upon it, and the covenant of a solvent party against the mortgage. The power of the court to compel a specific performance is an extraordinary power, and will not be exercised in behalf of a party who is either unwilling or unable to do that for which the defendant agreed to pay.

We cannot perceive that any influence, in such a case, ought to be given to the fact that the purchaser had knowledge that the incumbrance would not be due on the day fixed for making the conveyance. It was certainly competent for the parties to contract for its removal before its maturity. They did so contract in this case, and must abide by their agreement.

The judgment is reversed, with costs, and the cause remanded for a new trial.

HILL v. BUCKLEY.

(High Court of Chancery, 1811, 17 Ves. 394.)

THE MASTER OF THE ROLLS (Sir William Grant). The facts of this case are very few; and there is very little controversy upon them. In the particular, which was sent by the Defendant's agent to the Plaintiff's, which is the basis of the subsequent negotiation, the woods, called the Kestle Woods, including the Gulberry Marsh, were represented as containing two hundred and seventeen acres and ten perches. In fact there was not that quantity by about twenty-six acres. No deception was intended. The Defendant's agent fell into a mistake; the nature and cause of which now distinctly appear: but I do not think myself warranted by any evidence in the cause to infer, that the Plaintiff knew the real quantity. A very intimate acquaintance with the premises would not necessarily imply knowledge of their exact contents; while the particularity of the statement descending to perches, would naturally convey the notion of actual admeasurement. Where a misrepresentation is made as to the quantity though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase-money for so much as

the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain: therefore a rateable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known; and I do not think I could upon any principle in the case of *Mortlock v. Buller* to which this bears no resemblance, exempt these defendants from this equity upon the ground of their being trustees, and not owners.

But there is a difficulty in this case from the nature of the mistake which must have influenced the vendors in their estimate of the price in a manner, that, if a rateable abatement were now to be decreed, would be extremely disadvantageous to them; for, though they believed they had two hundred and seventeen acres to give to the purchaser, and must be supposed to have asked a price in proportion, yet they did not believe that it was all woodland. They imagined, that twenty-eight acres consisted only of hedges and fences, and other waste. They could not certainly set the same value upon that, though perhaps it was considered of some value, as upon land, covered with wood of mature growth; therefore, by a rateable abatement from the purchase-money it is clear they must allow to the purchaser much more than they would have received from him; and consequently they would be compelled to accept less than it was ever in their contemplation to take. That is not all. The purchaser also would obtain a better bargain than he ever had in his contemplation. He was in the course of the negotiation furnished with the value of the woods, *qua* wood, as ascertained in the year 1805. The value being given, it was immaterial, in that respect, whether the woods were spread over a greater or less number of acres. The valuation had no reference to the quantity of ground. All the wood upon the estate was comprehended; and it was represented to the purchaser, that what he was to get was wood, which in 1805, was of the value of £3500. He has got all the wood, upon which that value was set. Is he entitled, also, to the value of twenty-six additional acres of wood; which he would have in effect by an

abatement, made to him out of the purchase-money upon the proportion merely of quantity and price. The wood would have been no more valuable to him, if in fact it had occupied two hundred and seventeen acres, instead of one hundred and eighty-eight; nor would he have paid a shilling more for it; as the price of the wood was not fixed with reference to the ground, which it covered. Therefore it is only in the price of the soil, and not in the price of the wood that the purchaser could be injured by the mistake of the vendor; the particular representing the wood as occupying two hundred and seventeen acres: the purchaser has the right quantity of wood; but not of soil. He is therefore entitled to some abatement; as they gave him reason to believe, that he was to obtain two hundred and seventeen acres of soil; but the abatement is to be only so much as soil, covered with wood, would be worth, after deducting the value of the wood; and with an abatement, to be ascertained upon that principle, the argument ought to be carried into execution. . . .

JOYNER v. CRISP.

(North Carolina Supreme Court, 1912, 158 N. C. 199, 73 S. E. 1004.)

BROWN, J. . . . The facts are, as appears by the pleadings: That the property in question, known as the "Peebles Place," belonged to the feme plaintiff for her life, and after her death to her children some of whom are minors. At the time the contract referred to was entered into between the plaintiff and the defendant, the defendant admits he knew the status of the title, and there is nothing in the pleadings themselves which indicate, or even allege, that any imposition was practiced upon the defendant, or that he entered into this contract except with his eyes open. The contract upon its face indicates plainly that it does not lie within the power of the plaintiffs of their own will to comply with it. It appears upon its face that the plaintiffs own practically nothing but a life estate, and that the only method to carry out the contract was by appealing to the judicial tribunal to decree a sale of the infants' estate. The following excerpts from the contract are plainly indicative that resort to a judicial tribunal was absolutely essential to its performance, viz: "This option is to remain in force

for ninety days, or until such time as the parties of the first part can obtain by special proceedings in the superior court of Pitt county a judicial decree confirming to the party of the second part a fee-simple title." Again: "Upon the performance of the above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the superior court a deed in fee simple," etc.

The plaintiffs in this case had no power to enter into a contract to sell their children's land, and a mere promise to resort to a court for the purpose of decreeing a sale of it cannot possibly be enforced, for it is beyond the power of the plaintiffs to predicate what the judgment of the court may be. Upon this principle it is held that a party cannot recover upon a contract wherein a guardian who owned certain interest in land of which his ward was part owner agreed to institute and to carry through court proceedings necessary to the consummation of a sale or exchange of such property. *Zander v. Feely*, 47 Ill. App. 660; *LeRoy v. Jacobosky*, 136 N. C. 444, 48 S. E. 796, 67 L. R. A. 470. There have been cases where guardians have entered into such contracts, and, upon failure to perform them, have been held liable in damages personally. *Mason v. Waitt*, 4 Scam. (Ill.) 127, and *Mason v. Caldwell*, 5 Gilman 196, 48 Am. Dec. 330. But we find no instance where such contract has been specifically performed by decree of court, unless it was to the ward's interest.

In regard to the contention that the defendant is entitled to the partial performance and conveyance of the life estate, and damages in the way of abatement of the price, it may be said that we recognize the general rule that, where the vendor has not substantially the whole interest he has contracted to sell, yet the purchaser can insist on having all that the vendor can convey with compensation for the difference. But in this case it is apparent on the face of the contract that it was to be performed as a whole, stand or fall as an entirety, and therefore it cannot be specifically enforced as to part.

It is admitted by the defendant in his answer that he knew that the land in fee belonged to the plaintiff's children. It seems to be well settled that the rule that when a person makes a contract for the sale of real estate, in which he has only limited interest, he may be compelled in equity to convey as much of the property as lies in his power to convey, with a deduction from the agreed price, does not

apply where the purchaser at the time of the sale had notice of the defect in the vendor's title. . . .

WANAMAKER v. BROWN.

(South Carolina Supreme Court, 1907, 77 S. C. 64, 57 S. E. 665.)

The following is the circuit decree, omitting the formal judgment:

"The above-entitled action for the specific performance of a contract for the sale of real property, with the reservation of a portion of the purchase money, as indemnity against an outstanding incumbrance of an inchoate right of dower, came on to be heard before me, on the pleadings and testimony taken and reported by the master. From the testimony, I find as a matter of fact: That on August 31, 1905, the defendant, being the owner of a certain lot of land, described in the complaint, and hereinafter described in this decree, agreed to sell and convey the same to the plaintiff by a good and sufficient deed of conveyance. . . . That on September 23, 1905, the plaintiff tendered, and offered to pay, to the defendant the sum of \$5,400, as the balance of the purchase money due under said agreement, and demanded the delivery of a good and sufficient deed of conveyance to said property. Whereupon the defendant tendered a deed of conveyance to said property, which contained the usual covenants of warranty against the grantor and all others, but did not have indorsed upon it, nor was it accompanied by, renunciation of the dower right of Mrs. Mary Ann Brown, the wife of the defendant, in said property. The plaintiff refused to accept the deed tendered on the ground that there was not indorsed upon it, nor was it accompanied by, a renunciation of said dower rights, but offered, and still offers, to accept said deed of conveyance, and pay the balance of the purchase money, if the defendant would consent to a deduction from the purchase money of such amount as might be ascertained by the courts to be the value of such dower rights, or to the retention by plaintiff of such porportion of the purchase money as might be necessary to indemnify him against the claim of Mary Ann Brown for dower, so long as said claim might continue to exist as an incumbrance on said property; the payment of such amount so reserved to be made to the defendant at such time as the incum-

brance of the outstanding inchoate right of dower should be removed, and to be secured by a mortgage on the property conveyed. The defendant declined this proposition or to deliver any other deed than that tendered by him, on the ground that his wife refused to renounce dower, and that he was not called upon to give any other indemnity against such claim than that contained in the usual covenant of warranty contained in the deed tendered. The defendant is 57 years of age, and his wife 52. If the dower were now accrued, it would be one-sixth the value of the property.

"As matter of law, I conclude, under authority of *Payne v. Melton*, 69 S. C. 373, 48 S. E. 277, that an outstanding inchoate right of dower is such an incumbrance as a purchaser should be protected against. This protection may be given either by reducing from the purchase money the actual value of such inchoate right of dower at the time of the purchase, as indicated in that, and other cases, or by providing for a retention of a portion of the purchase money, secured by a mortgage on the land, until such dower right has vested, or ceased to exist, as an indemnity against such outstanding incumbrance. This latter provision seems to me more equitable and just than the former, on account of the difficulty of arriving at the present money value of the inchoate right. . . .

POPE, C. J. The facts of this case are set out in the decree of his honor, the circuit judge, which is affirmed for the reasons therein stated.

APPEAL DISMISSED

SAVINGS BANK CO. v. PARISSETTE.

(Supreme Court of Ohio, 1903, 68 O. St. 450, 67 N. E. 896.)

SPEAR, J. It is insisted by counsel for plaintiff in error that the stipulation in the option is for a deed conveying the entire property free from any and all rights, claims and incumbrances, and of the latter class is the inchoate right of dower; that the obligation, therefore, rested on the vendor to clear the title, and convey free of all claims of every kind; that failing this the vendee should have been allowed to retain so much of the purchase money as will protect his title against such inchoate right of dower, and the vendor decreed to convey on re-

ceiving the remaining part of the purchase money, and that the refusal of the circuit court to so adjudge was error. . . .

What was the contract specific performance of which plaintiff demanded, and what the breach, if any? The parties were the vendor, the husband, and the vendee, the plaintiff. The paper itself carries the information that it was when drawn contemplated to be executed by some one other than the vendor, and since the plaintiff was aware that he had a wife living, the inference is natural that she was the person whose signature had been expected. The paper further showed that she had not signed, and the fact found is that she had made no agreement to sign or sell the property, or release her inchoate right of dower. Furthermore, the absence of her signature would suggest a refusal by her. The Company knew, therefore that it was dealing with the husband alone as to his right and title in the property, it knew that the wife could not be compelled to sign, and that, therefore, the contract was impossible of specific execution if construed to include her dower. It knew that it was accepting a contract which on its face did not purport to sell any interest but that of the husband, and especially did not purport to sell or agree to convey any inchoate dower of the wife. In this situation of affairs the Company chose to agree to pay the stipulated price for just what the option purported to sell. No fraud or overreaching or mistake of any kind is charged. The vendor is ready to convey just what the stated terms of his contract obligate him to convey. How can the Company reasonably demand that the court import into the contract a stipulation to convey by a deed containing a covenant against this dower right, when no agreement of that character, nor respecting incumbrances of any kind, is expressed, and when in all probability, had such a demand been made of the vendor, he would have refused to comply with it? We think it cannot. The effect of the construction contended for by counsel would be either to attempt to arrive at a sum to be deducted absolutely by a process admittedly speculative, or to suspend the payment of a considerable portion of the purchase money to the grantor during the joint lives of himself and his wife, which it seems to us, could never have been within the contemplation of the parties when this optional contract was signed. Plaintiff was in a court of equity pressing an inequitable demand. We think it was properly refused. On the plaintiff's own construction of the option the Company is in the attitude of one who takes

the promise of another to do that which it is known he cannot perform except by the concurrence of a third person. Such purchaser contracts with full notice of the uncertainty attending the seller's ability to perform, and, not having been misled to his injury cannot now ask the extraordinary aid of a court of conscience in repairing such loss, if any, as he has sustained by the vendor's failure to complete his contract. . . .

SECTION VII. DEFENSES.

TUMLINSON v. YORK

(Texas Supreme Court, 1858, 20 Texas 694.)

HEMPHILL, CH. J. This was a suit for specific performance of a bond for title to land. It was commenced in the county court, where the prayer for performance was refused. On appeal to the district court, this judgment was reversed, and the cause has been brought by appeal to this court. We are of opinion that there was error in the judgment of the district court. The bond does not recite any consideration. There is no allegation in the petition, that a valuable consideration was paid by the vendee, and although there is no statement of facts, and we cannot ascertain from the record what facts were in proof, yet there being no allegation of the essential fact of valuable consideration, we cannot presume that, in violation of the rules of evidence, such fact was established by proof. The averments and proof must correspond; and this being the rule, we must presume there was no evidence of valuable consideration.

It is a well established rule, that specific performance of an agreement to convey land will not be enforced, unless founded on a valuable consideration. Where the receipt of such consideration is expressed in the agreement, or bond, its existence would be *prima facie* presumed; but where not so expressed, or admitted by the vendor in the pleadings, it must be established by proof; and being a material fact, it

must be averred that the proof may be admitted. *Boze v. Davis*, 14 Tex. 331; *Short v. Price*, 17 id. 397. In the latter case, reference was had to art. 710 of the Digest, and it was held inapplicable to cases where the plaintiff must show a valuable consideration as prerequisite to the decree, and where, on principles of equity jurisprudence, the seal imparts no efficacy to the instrument on which the suit is brought; that the only effect of the article would, in such cases, be, that where a valuable consideration is expressed in the instrument, it could not be impeached by the defendant, unless under oath; whereas on general principles of equity, this would not be required. . . .

MANSFIELD v. HODGDON.

(Massachusetts Supreme Court, 1888, 147 Mass. 304, 17 N. E. 544.)

HOLMES, J. . . . The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty days. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly repudiating the contract. *Carpenter v. Holcomb*, 105 Mass. 280, 282. *Ballou v. Billings*, 136 Mass. 307. *Gormely v. Kyle*, 137 Mass. 189. *Lowe v. Harwood*, 139 Mass. 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. *Galvin v. Collins*, 128 Mass. 525, 527.

A covenant to sell is not voluntary in such a sense that equity will refuse specific performance. If the defendant conveys, he will get *quid pro quo*.

WOOLUMS v. HORSLEY.

(Kentucky Court of Appeals, 1892, 93 Ky. 582, 20 S. W. 781.)

HOLT, C. J. . . . In December, 1888, this suit was brought for a specific performance of the contract. The main defense is that

it was procured through undue advantage, and under such circumstances that, in equity, its performance should not be decreed. . . .

There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity, and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill, than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically the party is left to his remedy at law.

Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree, where the plaintiff will not always be allowed relief upon the same evidence.

A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance. . . .

The appellee testifies that he did not know anything as to the mineral value of this land when the contract was made; but it is evident he had a thorough knowledge of the value in this respect of lands generally in that section, and of the developments then in progress or near at hand.

All this was unknown to the appellant. It is evident his land was valuable almost altogether in a mineral point of view. While it is not shown what it was worth at the date of the contract, yet it is proven to have been worth in April, 1889, fifteen dollars an acre, and that this value arises almost altogether from its mineral worth; and yet the appellee is asking the enforcement of a contract by means of which he seeks to obtain all the oil, gas, and minerals, and the virtual control of the land, at forty cents an acre. The interest he claims under the contract is substantially the value of the land. Equity should not help out such a harsh bargain.

The appellee shows pretty plainly, by his own testimony, that when the contract was made he was advised of the probability of the build-

ing of a railroad in that locality in the near future. His agent, when the trade was made assured the appellant that he would never be bothered by the contract during his life time. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue; and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension.

The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in any third party. A court of equity should, therefore, refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest; and when this is done his petition should be dismissed. . . .

FLEMING v. BURNHAM.

(New York Court of Appeals, 1885, 100 N. Y. 1, 2 N. E. 905.)

ANDREWS, J. The most serious objection made by the purchaser relates to the sufficiency of the deed of February 14, 1833, from Thomas McKie and Andrew Stark, two of the four executors named in the will of John McKie, to Gerardus De Forest, to pass title to the premises in question. . . .

The purchaser is entitled to a marketable title, free from reasonable doubt. The purchaser bids on the assumption that there are no undisclosed defects. The purchaser pays and the seller receives a consideration, regulated in view of this implied condition. Objections which are merely captious or mere suggestions of defects which no reasonable man would consider, although within the range of possibility or those which are clearly invalid by the law as settled, whatever doubts may at a former time have existed as to the question raised, are not available to a purchaser, and will be disregarded. But the question presented to the court on an application to compel a purchaser on a judicial sale who raises objections to the title tendered to complete the purchase, is not the same as if it was raised in a direct proceeding between the very parties to the right. Where all the parties in interest are before the court and the court has jurisdiction to decide, they are concluded by the judgment pronounced, so long as it stands unrevers-

ed, however imperfectly the evidence or facts were presented upon which the adjudication was made, or however doubtful the adjudication may have been in point of law. If the controversy involves a disputed question of fact, or the evidence authorizes inferences or presumptions of fact, the finding of the tribunal makes the fact what it is found to be for the purpose of the particular case, although the evidence of the fact may be weak and inconclusive, or although it is apparent that there are sources of information which have not been explored, which if followed might have removed the obscurity. The parties are nevertheless concluded in such a case, because they were parties to a judicial controversy before a tribunal constituted for the very purpose of deciding rights of persons and property and before which they had an opportunity to be heard. But the court stands in quite a different attitude, where it is called upon to compel a purchaser to take title under a judicial sale, who asserts that there are outstanding rights and interests not cut off or concluded by the judgment under which the sale was made. The objection may involve a mere question of fact or it may involve a pure question of law upon undisputed facts. In either case it may very well happen that the question is so doubtful that, although the court would decide it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceeding to compel a purchaser to take title and would relieve him from his purchase. The reason is obvious. The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of facts, or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences. There must doubtless be a real question and a real doubt. But this situation existing, the purchaser should be discharged. (*Shriver v. Shriver*, 86 N. Y. 575, and cases cited; *Hellreigel v. Manning*, 97 id. 56). . . .

CRABTREE v. WELLES.

(Supreme Court of Illinois, 1857, 19 Ill. 55.)

Welles and his wife had verbally contracted with Crabtree to sell him a piece of land for one hundred and fifty dollars; fifty dollars was paid at the time of the bargain, and Crabtree was to have a deed when he would pay the other one hundred dollars.

Crabtree tendered the remaining one hundred dollars, but Welles refused to make the conveyance, but prior to the tender of the one hundred dollars, Welles sued Crabtree before a justice of the peace for a debt due him from Crabtree, when the latter attempted to set off against the claim the fifty dollars advanced for the land, but this set-off was not allowed. Crabtree, after having made the tender of the one hundred dollars, as the price of the land, which was refused by Welles, brought an action to recover back the fifty dollars originally advanced. On the trial of the suit for the recovery of this sum, it was attempted to defeat the recovery by showing that a set-off had been attempted in the first suit between the parties, and before the tender of the one hundred dollars. The Circuit Court, Breese, Justice, presiding, gave judgment, upon the finding of the jury for fifty dollars, whereupon Crabtree prayed an appeal. . . .

CARON, C. J. The law is, that one who advances money in part payment of a parol purchase of land, cannot recover it back, till he has offered to fulfill the parol agreement, and the other party has repudiated it by refusing to perform.

If he repudiates it himself, without the default of the other party, he must lose what he has paid. Such parol agreement is not absolutely void, but is only voidable, and is binding on both parties, and may be enforced either in a court of law or equity, unless the statute of frauds be interposed, to relieve the party from his obligations under it. If a party who receives money or its equivalent, under such parol contract, afterwards repudiates it, the law will raise an assumpsit on his part to refund the payment recovered; for he shall not return the money under the contract, while he denies his obligation to perform it, but until he refuses to perform it the law will not imply a promise to refund the payment received under it. Welles, therefore, had no

cause of action against Crabtree for the fifty dollars which he had paid him on the parol agreement until after he had placed himself in a proper position by demanding of Crabtree that he go on and perform the parol agreement upon tendering him the remaining hundred dollars, and Crabtree had thereupon refused to comply. The law cannot presume a promise to refund that money till such refusal has taken place, and, till then, no cause of action existed in favor of Welles against Crabtree on account of that advance. At the time of the trial of the former cause which was relied upon as a bar to this action Welles had not made the tender of the last payment, and Crabtree had not repudiated the parol agreement, so that no liability then existed against him to refund the fifty dollars. The question, then, is, whether his attempt to bring in, and recover it back on the trial of the former action between the same parties, is a bar to this action. On this point there ought not to be any doubt or controversy. At the time of that trial, the money was not due, and for that reason he could not then recover it. The account then presented was, or must be presumed to be, for fifty dollars, then claimed to be due, which he did not and could not prove. This is for fifty dollars not then due, but which has since become due, and consequently, could not be barred by anything that was then due. Suppose on the former trial, Welles had filed, as a set-off, a note executed by Crabtree to him for fifty dollars, which, upon its face, was not due till thirty days thereafter, could it be pretended that the abortive attempt to set it off on the former trial would be a bar to an action upon the note instituted after its maturity? The statement of the proposition is enough to illustrate the utter fallacy of his whole defense. The Circuit Court decided properly, and the judgment must be affirmed.

NIBERT v. BAGHURST.

(New Jersey Court of Chancery, 1890, 47 N. J. Eq. 201, 20 Atl. 252.)

GREEN, V. C. The bill of complaint in this action is filed by Francis Nibert against George Baghurst and wife and Francis Phillips, for the specific performance of a contract for the sale of lands and the conveyance of the same according to the alleged terms thereof. . . .

The defendants resist the application for an injunction, on the grounds that the alleged agreement was by parol, and is not enforceable under the statute of frauds, and that it was made on Sunday, and is void under the laws of this state.

The petitioner seeks to avoid the objection based on the provision of the statute of frauds, first, on the ground that there had been such a part performance of the contract as to take the case out of the statute, under the rules which obtain in the courts of equity, and that there was a sufficient memorandum under the statute of this state. . . .

The clear weight of the testimony is, that the possession of Nibert, so far from its being by the act or consent of Baghurst and under the agreement was forcible and against his positive and reiterated protest. Possession taken and held under such circumstances can not be construed to be a part performance of the contract. . . .

The equity arising from the expenditure of money in the building of a house is based on the rightful possession by Nibert of the property, and the knowledge of Baghurst and his acquiescence in such acts of assumed ownership.

Equity proceeds on the ground that it would be a fraud for the vendor to allow the vendee to continue in possession and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of an agreement of sale, and then try to avail himself of the statute of frauds to avoid the contract. *Young v. Young*, 18 Stew. Eq. 27, 34; *Eyre v. Eyre*, 4 C. E. Gr. 102; *Green v. Richards*, 8 C. E. Gr. 32; *Brewer v. Wilson*, 2 C. E. Gr. 180, 185; *Pom. Cont.* § 104; *Pom. Eq. Jur.* § 1409.

The bare statement of the principle presupposes acquiescence on the part of the vendor, and acquiescence assumes knowledge of the vendee's acts. "For, to constitute fraud, there must coincide, in one and the same person, knowledge of some fact and conduct inequitable having regard to such knowledge." *Fry Spec. Perf.* § 389.

We have seen that the possession of Nibert was against the wish and warning of Baghurst, and it clearly appears that the latter commenced proceedings in ejectment as soon as he heard the building was being erected. The erection of the house and the possession of the land are both of the same character. They fail as elements of part performance, because done without the knowledge or acquiescence of the vendor. . . .

MORRISON v. HERRICK.

(Illinois Supreme Court, 1889, 130 Ill. 631, 22 N. E. 537.)

BAILEY, J. Regarding the oral contract for a lease as sufficiently proved, the question arises whether such part performance has been shown as will take it out of the operation of the Statute of Frauds. . . .

The evidence shows beyond controversy that the complainants expended large sums of money in making permanent improvements upon the demised premises and in fitting up and furnishing the same for use in carrying on their business, and it is equally beyond controversy that these expenditures were made under and in reliance upon the original contract for a lease for a further term of five years. So far then as the making of valuable improvements can constitute an element of part performance, the complainants have established their right to a decree. It is true the improvements were all made before the term contemplated by the oral agreement was to commence, and while the complainants were in possession under their former lease, but that circumstance does not seem to us to be material, so long as the improvements were in fact made in reliance upon and in pursuance of the provisions of the oral agreement.

The more difficult question relates to the possession which the complainants must establish and rely upon as an act in part performance. It is undoubtedly the rule that acts of part performance, whatever they may be, must refer exclusively to the contract, and be such as would not have been performed but for such contract. They must be such as can not be explained consistently with any other contract than the one alleged, that is to say, they must refer to, result from, and be done in pursuance of such contract. If therefore possession is relied upon as an act of part performance, it must be possession under the contract sought to be enforced. The continuance of possession taken before the contract was made is accordingly not usually held to be sufficient. 2 Reed on Stat. of Frauds, sec. 585. This rule applies especially to cases where the previous holding is under a lease, for as the tenant may lawfully continue in possession until notice to quit, such continuance in possession is presumptively referable to the lease. It has therefore been sometimes questioned whether, as between landlord

and tenant, part performance is possible. But the better doctrine would seem to be, that one continuing in possession is at liberty to prove, if he can, that his possession, after the termination of the former lease, is under the oral contract. . . .

In *Mundy v. Joliffe*, 5 Mylne & Craig, 167, a tenant who went into possession of premises under a former lease, obtained from his landlord an oral contract for a renewal of his lease for a further term, said contract stipulating, among other things, for the making of certain improvements on the demised premises. The tenant continued in possession, and after the stipulated improvements were made, brought his bill for a specific performance of the contract, and it was held, as a matter about which there could be no doubt, that a sufficient part performance was shown. . . .

Applying this rule to the present case, we are disposed to hold, that, while, *prima facie*, the complainants, by remaining in possession after the expiration of the term to their former lease, assumed the position of tenants holding over, the presumption that they did so is not conclusive, but is subject to be rebutted by evidence tending to a contrary conclusion. Of this character is the evidence of the expenditures made by them by way of improvements under and in performance of their oral agreement. These expenditures serve to explain and characterize their subsequent holding over after the termination of their former lease. Presumptions are thereby raised which are sufficiently cogent to overcome the ordinary presumption that a tenant holding over does so under his former lease. It is against all ordinary probability that, after having expended \$6000 or over in reliance upon and in performance of the agreement for a lease for five years, they were content to assume the attitude of mere tenants holding over, thus placing themselves in a position where their landlord would be at liberty to terminate their tenancy absolutely at the expiration of the first year, and thus deprive them, without the possibility of adequate recompense, of much the larger part of the benefit to be derived from their expenditures. . . .

HALE v. HALE.

(Supreme Court of Appeals of Virginia, 1894, 90 Va. 728, 19 S. E. 739.)

LEWIS, P. . . . The equitable doctrine of part-performance is also invoked; but as to this, we may say, as was said in a similar case
1 Eq.—12

in Massachusetts, that "there has been no part-performance which amounts to anything." *Gould v. Mansfield*, 103 Mass., 408. In that case there was, as here, an alleged oral agreement between two sisters to make mutual or reciprocal wills, and each made a will accordingly. Afterwards one of the sisters made a different will, and died. The survivor then filed a bill for the specific execution of the agreement, but a demurrer to the bill was sustained, on the ground that the case was within the statute of frauds.

Notwithstanding the criticism upon that case in the argument at the bar, we are of opinion that it was decided upon correct principles. Not only is it a cardinal feature of a will that it is ambulatory until the testator's death, but acts of part-performance by the party seeking specific execution, to take a case out of the statute, must be of such *an unequivocal nature as of themselves to be evidence of the existence of an agreement*; as, for example, where, under a parol agreement to sell land, the purchaser is put into possession, and proceeds to make improvements. 2 Min. Insts. (4th ed.), 853; 3 Pom. Eq., sec. 1409. In the language of Lord Hardwicke, the act of part-performance "must be such as could be done with no other view or design than to perform the agreement." *Gunter v. Halsey*, Amb., 586. "The principle of the cases," said Sir William Grant in *Frame v. Dawson*, 14 Ves., 387, "is that the act must be of such a nature that, if stated, it would *of itself* infer the existence of some agreement; *and then* parol evidence is admitted to show what the agreement is."

In *Phillips v. Thompson*, 1 Johns. Ch., 131, Chancellor Kent said: "It is well settled that if a party sets up part-performance to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, that agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case." To the same effect is *Wright v. Puckett*, 22 Gratt., 370.

This whole subject was very carefully considered, both upon principle and authority, in *Maddison v. Alderson*, a recent and instructive case in the House of Lords. (8 App. Cas., 467.) In that case the appellant was induced to serve the intestate as his housekeeper without wages until his death by an oral promise on his part to leave her an in-

terest in certain real estate; and he made a will for that purpose, which he signed, but which failed for want of due attestation. Mr. Justice Stephen, before whom the case was tried in the first instance, held that there was a contract which had been partly performed; but on appeal, first to the Court of Appeal, and afterwards to the House of Lords, this ruling was held to be erroneous; and the principle was laid down that an act of part-performance, to take a case out of the statute, must be sufficient of itself, without any other information or evidence, to satisfy the court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

This is so, because, as was said in the same case, the defendant in a suit founded on such part performance is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. Hence, until such acts are shown as of themselves imply the existence of some contract, parol evidence to show the terms of the contract relied on is inadmissible. Browne, Stat. Frauds, sec. 455; Dale v. Hamilton, 5 Hare, 381; Maddison v. Alderson, *supra*.

Now the alleged acts of part performance in the present case, taken singly or collectively, do not bring the case within these principles. The making and preserving the wills, under the circumstances stated in the bill, while they are acts consistent with, are yet not demonstrative of, the existence of any contract between the parties, or, in other words, they do not unequivocally show that there was a contract. *Non constat*, the wills were not made from motives of love and affection, and independently of any contract or agreement; and this being so, parol evidence to establish the alleged contract would not be admissible. . . .

CATON v. CATON.

(In Chancery, 1866, L. R., 1 Ch. App. 137.)

Extract from finding of facts by Stuart, V. C:

"What is proved in the present case is that the testator and his intended wife having proposed to make a settlement (the draft of which

was prepared in accordance with that memorandum which is in his own handwriting), changed their intention as to the machinery, and, instead of a settlement, it was proposed, and agreed to by both parties, that the testator, the intended husband, should by will do that which it was originally intended he should do by settlement." . . .

LORD CRANWORTH, L. C. . . . The same clause of the statute which forbids the bringing of an action on any parol contract made in consideration of marriage, also forbids the bringing of any action on any parol contract for the sale of land. But, though Courts of equity have held themselves bound by this last enactment, yet they have in many cases felt themselves at liberty to disregard it when to insist upon it would be to make it the means of effecting instead of preventing, fraud. This is the ground on which they require specific performance of a parol contract for the sale or purchase of land when that contract has been in part performed. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract. His Honour the Vice-Chancellor Stuart, according to the report of this case, appears to have thought that the decisions under this head of equity (and they are very numerous) are applicable to the present case, but with all deference to the Vice-Chancellor, I cannot think that this is a correct view of the law.

That marriage itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity.

It was not, however, on the mere fact of the marriage that the Vice-Chancellor rested his judgment. His Honour relied mainly on the circumstance which he considered to have been well proved, that, previously to the marriage, the intended husband, in conformity with the verbal promise he had solemnly made to his wife, prepared a will whereby he gave to her all that he had agreed to give her; and further, that he had executed this will in due form of law immediately after the solemnization of the marriage. I do not however think, even if all this had been clearly made out in proof that it amounts to any part performance so as to prevent the operation of the statute, The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced, or allowed by the other, to alter his

position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money. But such cases bear no resemblance to that now under consideration. The preparing and executing of the will caused no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged. If I agree with A. by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A to complete the purchase, but it certainly would afford no foundation for a claim by A to compel me to sell on the ground that I had partly performed the contract. The circumstance of the preparing and executing the will (supposing it satisfactorily proved) might afford strong evidence of the existence of the parol contract insisted on, if that were a matter into which we were at liberty to inquire; but it can have no effect as giving validity to an otherwise invalid contract. I must further observe that the nature of the alleged agreement was such as hardly to admit, even on the part of the party to be charged, of anything like part performance. As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a contract of a negative nature—a contract not to vary what has been so prepared and executed. I do not see how there can be part performance of such a contract. . . .

SLINGERLAND v. SLINGERLAND

(Supreme Court of Minnesota, 1888, 39 Minn. 197, 39 N. W. 146.)

GILFILLAN, C. J. The parties stand in the relation of father and son. The defendant, the father, owned a large farm in the county of Dodge. On the 5th day of March, 1866, there were pending in the district court in said county five several actions or proceedings,—one an action by plaintiff against this defendant to recover about \$15,000, for services rendered between June, 1879, and January, 1886.

. . . These actions and proceedings were all defended, the controversy in each being really between this plaintiff and defendant. They were all on the calendar of the March term, 1886, of the court for trial, and the first was on trial, when on said 5th day of March, 1886, the defendant orally offered to plaintiff that if he would dismiss said actions brought by him, and turn over to defendant said money in the county treasury, he (defendant) would convey said farm to him, with the stock, machinery, and personal property, on the day when he should be married to a certain young lady, to whom he was then, and for some time had been engaged to be married as soon as his pecuniary circumstances would warrant his assuming the support of a family, which engagement, and the reasons for delay in it, were known to and approved of by defendant. Plaintiff thereupon orally accepted said offer, and forthwith dismissed said actions, and withdrew his claim to the money involved in said mandamus proceeding, and such money was thereupon paid over to defendant, and the proceeding dismissed. On the 31st of March, 1886, plaintiff and said young lady were married. From March 5th till some time after the marriage defendant intended to carry out his agreement, but on December 8th, following, on a formal demand by plaintiff for a conveyance, he refused to execute it, and denied any agreement or obligation to do so. . . .

In this case no remedy is apparent that will restore plaintiff to the situation he was in, or put him in as good a situation as he was in, at the time of making the agreement. If the actions and proceedings then pending could be reinstated by vacating the dismissals still plaintiff irretrievably lost the opportunity to try them at the March term, 1886. An opportunity to try them a year or two after that time, when perhaps, plaintiff's ability to present his claims would not be the same, would not be an equivalent for the right to try them at that term. But they could not all be reinstated. The proceeding against the county auditor certainly could not be, nor could a new similar proceeding be instituted. If the bank, relying on the settlement between plaintiff and defendant, and the dismissals of the actions against it, changed its position, so that restoring the actions would operate as a fraud upon it, those actions could not be reinstated; and, for the same reason, new actions for the same causes could not be maintained against it. As to the action against defendant, plaintiff might succeed in having them reinstated, or, if he did not succeed, might bring new actions;

but, in the latter event, a part of the cause of action in one of them would, in the meantime, have become barred by the statute of limitations.

The only other suggestion of a remedy to plaintiff is that he might have brought an action for damages for the loss sustained by his dismissal of the former actions and proceedings. Such an action would be novel, though it might be maintained. The difficulties in the way of prosecuting it, so that the recovery would put him in as good position as he was in before, would be great. He would have to show to what extent he had lost his original claims, and the value of what was so lost. Take the cases against the bank. He would have to show that his rights as against it were gone, and then show his claims against it. And so with the other actions. The dismissals were not made on a money consideration, nor did the parties intend the value of the actions to be measured by a money standard. In no way could the loss of the advantage which the right to try the actions at the March term, 1886, gave him be estimated in damages, nor any recovery he had for it. Among all the cases we have cited, in no one was it clearer than an action for damages was not an adequate remedy than it is in this case. . . .

GLADVILLE v. McDOLLE.

(Supreme Court of Illinois, 1910, 247 Ill. 34, 93 N. E. 86.)

MR. JUSTICE CARTWRIGHT. . . . The contract was verbal, and in such a case it must be proved by competent evidence and be clear, definite and unequivocal in its terms. (Clark v. Clark, 122 Ill. 388.) The evidence fully satisfied that requirement. It was also proved, and not contradicted, that Eva Gladville fully performed the contract in accordance with its terms, and the only question to be determined is whether she is entitled to a specific performance of it although it was within the Statute of Frauds and invalid at law. The invalidity consisted of the fact that it was not reduced to writing and signed, and no action at law will lie upon such a contract. The courts of equity, however, will not permit the Statute of Frauds, the only purpose of which is to prevent fraud, to be used where the effect will be to ac-

comply with a fraud and where a verbal contract has been performed, either fully or in part, by the party seeking the remedy, and the facts are such that it would be a virtual fraud to permit the defendant to interpose the statute, a court of equity will not listen to that defense. If the defendant has knowingly permitted the complainant to do acts in performance of the verbal agreement and in reliance upon it, which change the relation of the parties and prevent a restoration to their former condition by a recovery at law of compensation for the acts performed, it would be a fraud on the complainant to permit the defense to be made, and the statute, which is intended to prevent fraud, would be made the means of fraud. In equity the rights and duties of the parties are the same as they would have been if the contract had been written and signed, and unless the one who has performed the contract in good faith can be made whole in damages he is left without any adequate remedy at law, and equity will compel the other party to do the thing which was agreed to be done. (3 Pomeroy's Eq. Jur. sec. 1409; 26 Am. & Eng. Ency. of Law,—2d. ed.—50.) Payment of purchase money, alone, will not take the contract out of the statute, for the reason that it can be recovered back, with interest, in an action at law. (*Temple v. Johnson*, 71 Ill. 13.) The same is true of personal services, which can be estimated in money, for which a recovery can be had in law, because the law would in that case afford a sufficient remedy. In this case there could be no recovery at law for the labor, sacrifices and deprivations of Eva Gladville during ten years of service, which were worth as much as the land was then worth, for the reason that any claim for them was outlawed by the Statute of Limitations long ago. The mere fact of possession, without other circumstances, would not justify a decree for a specific performance, and in most cases the use of the land would be a full compensation for all injuries sustained. The basis for relief in a court of equity is the equitable fraud resulting from setting up the Statute of Frauds as a defense, and there have been many cases in this court where equity has afforded a remedy by specific performance if the contract has been performed by one party in such a way that the parties cannot be placed in statu quo or damages awarded which would be full compensation. In contracts between parties for the conveyance of land there is usually a provision for possession under the contract at some time, and naturally one of the most frequent acts of part performance is taking

possession and making improvements on the land. This court has enforced specific performance of verbal contracts where such possession has been taken, coupled with payment of the purchase price, and especially if lasting and valuable improvements have been made. (*Ramsey v. Liston*, 25 Ill. 114; *Langston v. Bates*, 84 id. 524; *Smith v. West*, 103 id. 332; *McNamara v. Garrity*, 106 id. 384; *Irwin v. Dyke*, 114 id. 302; *Hall v. Peoria and Eastern Railway Co.* 143 id. 163.) And a contract invalid at law may be specifically enforced against the heirs of a party to such contract. *Simonton v. Godsey* 174 Ill. 28.

Much of the argument against the right to a specific performance is devoted to the claim that Eva Gladville did not have possession of the land in the lifetime of John P. Jester or Phebe Jester, and that there can be no decree for specific performance without such possession. The keys were delivered to her by Phebe Jester a few days before the death of Phebe Jester, and she was put in such possession of the property as was consistent with existing conditions and circumstances. But if there was no actual possession and it was merely constructive, it cannot be that equity will deny a remedy upon that ground, alone, where the result would be to accomplish a fraud. The cases where possession has been regarded as of controlling importance are cases where the purchaser became entitled to possession under the terms of the contract, but in this case Eva Gladville was not entitled to possession in the lifetime of John P. Jester or Phebe Jester but by the very terms of the contract was to have such possession after they died, and she took and has held actual possession ever since the death of Phebe Jester. To say that possession in the lifetime of the other party by one claiming under a verbal contract is indispensable to any remedy in equity, would be to say that there can be no remedy where the complainant did not become entitled to possession until the death of the other party, although such a rule would operate as an unmitigated fraud. The ground for interference by a court of equity being that there have been such acts of performance on the part of one claiming the benefit of the contract as would compel him to suffer an injury amounting to a fraud if the statute is interposed as a defense, it would be as anomalous as it would be absurd to recognize nothing as performance except taking possession of the land when a party could not lawfully take such possession. To permit the defendants to the bill of Eva Gladville to repudiate the contract because she did not have

possession before she became entitled to it, when she has performed her contract and cannot be compensated except by an enforcement of it, would be to perpetrate a fraud equal to any other. . . .

YOUNG v. OVERBAUGH.

(New York Court of Appeals, 1895, 145 N. Y., 158, 39 N. E. 712.)

GRAY, J. The plaintiff brought ejectment to recover the possession of land and a dwelling thereon, occupied by the defendant and her husband. It was conceded that the legal title was in plaintiff's testator, at the time of his death; but the defendant claimed that she was the owner of the equitable title to the premises, by reason of promises made by the plaintiff's testator to her and of acts done by her in reliance upon those promises. . . .

In 1872, Thomas Cornell, the plaintiff's testator, was the owner of the premises in question. He was the half-brother of the defendant and upon his request she and her husband had settled in the city of Kingston. In the year mentioned, Mr. Cornell asked the defendant's husband to build a house for the defendant on a certain piece of his property, at the cost of \$4500, and to bring the bills to him for payment. The house was built at a cost which exceeded, by about \$1,200, the sum named by Mr. Cornell, and the defendant subsequently, made valuable permanent improvements upon the property; such as building a barn, planting of fruit trees, putting in a heating apparatus, etc.: of all which Mr. Cornell had knowledge. Other facts found were that, after the defendant had contracted to erect a house upon the property, Mr. Cornell had stated that the house was built for the defendant and was hers; and so spoke of it to different persons at different times. Upon one occasion, in the year 1876, upon the defendant's husband informing Mr. Cornell that he had found a business at Yonkers, which he thought it would be a good thing to go into, the latter replied, to the effect, that if they moved away from the property where they then resided the defendant should not have it and that they would lose it. There was this specific finding: "That such improvements, as well as the payment of \$1,200, were made and expended on the faith of the promises

by Cornell, to give the property to Mrs. Overbaugh (this defendant), and all such moneys were expended, and improvements made, for and on behalf of the defendant and at her request, and under her promise to repay her husband thereafter." There was a finding that the total amount of money expended by the defendant for permanent improvements, repairs, taxes, insurance, etc., and including, also, repairs and expenses, which are incidental to the ordinary care of a house, from the beginning of the erection of the house down to the date of the trial, was the sum of \$4,734.26 and that the fair rental value of the property of the defendant during her occupancy, for a period of about twenty years, was \$250 per year; amounting in the aggregate to \$5,000.

The learned trial justice conceded the existence of the exception to the general rule, that a parol gift of real estate is void, in a case where the donee enters into possession of and improves the property, upon the strength of the promise that it would be given to her; but he did not think that the present case fell within the exception. He was influenced in that view by a consideration of the nature of the acts done by the defendant, in reliance upon the promise of Mr. Cornell. Regarding the equitable rule to be founded in the idea of preventing an injustice being done to a promisee, if the promisor be permitted to avail himself of the statute, and that the application of the rule is in a case where financial injury will be sustained; he, in the first place, considered that as the defendant's acts were only such as an ordinary householder would be expected to make and, in the second place, as the fair rental value of the premises during the twenty years of the defendant's occupation was worth to her, altogether, a sum which exceeded the aggregate of the sum found to have been expended by her, or at her request, during that time, that if the defendant was compelled to surrender possession of the premises, she would not, in fact, be a loser as the result of the entire transaction with Mr. Cornell, but the gainer. Hence he concluded that there was absent here that element of injustice to the donee; which is essential to exist, in order to entitle him to an enforcement of the donor's promise.

We find ourselves unable to agree with the trial justice in his judgment upon this question and we prefer the view taken at the General Term; that where there has been a parol promise to convey,

a taking of possession under such promise and the making of permanent improvements upon the property upon the faith thereof, the mere value of the occupation during the time is not to be set off against the expenditures made. I think it would not be within the spirit of the rule in equity that its application should be made to depend, not upon the fact of a consideration for the promise being shown to have existed and to have been performed, but upon the question whether, when specific performance by the donor is claimed, the use has not compensated the donee and relieved the donor's obligation. . . .

In such a case as this, to constitute a good consideration in equity, it is, of course, essential that it be substantial; in the sense that the promise shall rest upon a performance by the promisee, which evidences acceptance of and reliance upon the promise and consists in expending moneys in permanent improvements upon the land. In this case it may well have been, as found, that some of the expenditures made by the defendant upon the property were such as a householder would ordinarily make, or were trivial in their nature; but they do not influence the character of the others. We have the fact that the house was contracted for upon the promise of Mr. Cornell; that its cost exceeded the sum, which he agreed to be responsible for, by \$1,200, and that there were the other improvements of a permanent character, to which I have adverted as being found. There was, in fact, such a consideration for the promise of Mr. Cornell as to have made it obligatory upon him to perform it, in order that the defendant should not be defrauded and injured. It would be very inequitable to deprive the agreement of its obligatory character, merely because, during the time of the occupation of the defendant under the parol promise, the fair rental value of the premises would amount, in the aggregate, to a sum in excess of the amount altogether expended. If there was the promise to give the property, accompanied by the delivery of possession to the defendant and expenditures in permanent improvements made, in reliance upon the promise, injury will be presumed to follow by a failure to perform it. In enforcing such a promise, equity aims at preventing a fraud upon the donee and regards the case as taken out of the operation of the statute by the part performance. . . .

GIRARD v. LEHIGH STONE CO.

(Illinois Supreme Court 1917, 280 Ill. 479, 484, 117 N. E. 698.)

MR. JUSTICE DUNCAN. . . . The agreement by which appellee claims an easement across appellants' land was a verbal agreement. It is well settled that an easement or other incorporeal hereditament in lands cannot be created by parol but only by grant, or by prescription, which presumes a grant. (Lake Erie and Western Railroad Co. v. Whitham, 155 Ill. 514.) At law a parol license is revocable though a consideration has been paid or expenditures have been made on the faith of the agreement. (St. Louis Nat. Stock Yards v. Wiggins Ferry Co. 112 Ill. 384; Tanner v. Volentine, 75 id. 624.) Courts of equity, however, will interfere to restrain the exercise of a legal right to revoke a license on the ground of preventing fraud and will construe the license as an agreement to give the right. (Jones on Easements, sec. 76; Hunt v. Sain, 181 Ill. 372; Kamphouse v. Gaffner, 73 id. 453.) Appellants went into the circuit court by bill in equity to enjoin the doing of the very thing they had agreed appellee should do, according to the finding of the circuit court. Appellee had expended large sums of money on the faith of their agreement, and it would amount to a fraud on appellee to permit appellants to thus undo their agreement. They are asking equity but at the same time are not offering to do anything to make appellee whole on its expenditures. . . .

JOHNSON v. HANSON.

(Supreme Court of Alabama, 1844, 6 Ala. 351.)

Assumpsit by the plaintiff, against the defendant in error.

The two first counts of the declaration, set out a sale of land by the plaintiff to the defendant, at the price of eight hundred dollars, to be paid, one half on the first of January, 1839, and the remainder on the 1st January, 1840—that the defendant went into peaceable possession of the premises, and has hitherto retained it, and that the defendant

has paid three hundred dollars, part of the purchase money—that the plaintiff is able and willing, and ready to make title according to his contract, upon the payment by the defendant, of the purchase money, and concludes with the usual *super se assumpsit*.

The defendant demurred to these counts of the declaration, and judgment being rendered on the demurrer, for the defendant, and the plaintiff declining to plead over, judgment was rendered against him. . . .

ORMOND, J. It is not in general, necessary to allege in a declaration, a written promise, where the necessity for the promise being in writing, is created by statute, as it is matter of evidence to be proved at the trial, but in this case, it is expressly alleged that the contract for the sale of the land, which was the consideration of the promise laid in the declaration, was merely verbal, and the precise question is, whether an action can be maintained at law, to recover the purchase money of land, there being no note or memorandum thereof in writing, because the vendee retains the possession.

A court of chancery acting on its own peculiar rules, will, in certain cases, for the prevention of fraud, enforce a specific performance of a verbal contract for the sale of land; as where there has been a part performance of the contract, but we are not aware that such a power has ever been acknowledged to reside in a court of law. Doubtless some isolated cases may be found, in which it has been held that the equitable circumstances which would authorize a court of chancery to grant relief, might be considered in a court of law.

Lord Redesdale remarks, "Mr. Justice Buller says, in one or two cases, that part performance will take a case out of the statute, as well at law as in equity. This opinion will be found wrong; and I recollect Mr. Justice Buller, on being pressed with the consequences of that opinion, in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a court of equity goes in cases of part performance, is that sort of fraud which is cognizable in equity only." *O'Herliky v. Hedges*, 1 S. & L. 130. . . .

The recent decision of *Cope v. Williams*, 4 Ala. 364, has been pressed on the court, as tending to a contrary conclusion. In that case, the vendee in possession, brought an action to recover back the purchase money. This court held, that it was contrary to equity and good conscience, to permit him to assert the invalidity of a contract,

by virtue of which he retained the possession of the land; the vendor being willing to execute the contract.

The difference between that case and the present is, that here the vendee repudiates the contract, and if he retains the possession of the land, it is not by force of the contract, which at law can confer no rights on either party, but because the vendor chooses to acquiesce in it.

Whatever may be the rights of these parties in a court of equity, it is certain no right can be derived by either in a court of law, from a contract declared void by statute.

Let the judgment be affirmed.

WOOD v. MIDGLEY.

(In Chancery, 1854, De G., M. & G., 41.)

This was an appeal from the decision of Vice-Chancellor Stuart overruling the demurrer of the defendant to a bill for specific performance filed by vendors of leasehold property. The ground of the demurrer was that the bill alleged no sufficient agreement in writing within the Statute of Frauds. . . .

TURNER, L. J. . . . As to the second point, it is said that a defense founded on the Statute of Frauds cannot be taken by way of demurrer, because the statute does not destroy a parol contract, but only prevents the enforcement of a contract unless it is evidenced by an agreement signed by the party to be charged; and a distinction was attempted to be drawn on this ground between the Statute of Frauds and the Statute of Limitations. But I cannot see any distinction between them for this purpose, because the Statute of Limitations does not destroy a debt any more than the Statute of Frauds destroys a contract. On the same principle it must rest on the plaintiff to allege a state of facts, in each case, taking it out of the operation of the statute. Both cases depend on the same principle, which is, that it is incumbent on the plaintiff to state facts entitling him to equitable relief. (See 1 Dan. Ch. Pr. [4th Am. ed.]365. In *Foster v. Hodgson*, 19 Ves. 180, 184, Lord Eldon said, "I was present, and I believe counsel in the cause of *Beckford v. Close*; and I am sure

that Lord Kenyon, upon the doctrine he then held, thought that advantage might be taken of a case of this sort by demurrer; asking, if a plaintiff states upon his bill a case, on which the defendant may insist that the remedy shall be taken away, why may he not do so by demurrer?" It seems to me, therefore, that a defense resting on the Statute of Frauds may be made by demurrer.

Upon the merits the argument is threefold. First, it is said that the defendant has so acted as to avoid signing the agreement, holding the other party bound by the agreement, and *Maxwell v. Mountacute*, Prec. in Ch. 526, is referred to on this head. But the principle of that and similar cases is fraud. If a party has been guilty of fraud, beyond all doubt the Court will not let him take advantage of the Statute of Frauds. All the cases referred to, including *Hammersley v. De Biel*, 12 Cl. & Fin. 45, *Walker v. Walker*, 2 Atk. 98 and *Muckleston v. Brown*, 6 Ves. 52, rest on this principle. Is there, then, a case alleged by this bill of this nature, that the defendant did by his fraudulent act prevent the agreement from being reduced to writing. I think that there is no allegation on the bill bringing forward a case of fraud. The case alleged is simply this, that there was an agreement for a sale by the plaintiffs to the defendant for £1,000, and that defendant said that he would not sign any agreement. The law has said that the defendant is not to be sued unless upon an agreement signed by him. Is it a fraud on that law for him to say, I have agreed, but I will not sign an agreement? . . .

GREEN v. GREEN.

(Kansas Supreme Court, 1886, 34 Kan. 740.)

HORTON, C. J. Harriet F. Wilcox, being the owner of certain real estate, and about to be married to Oliver Green, signed and executed deeds of all of her real estate to her children the day before her marriage. The deeds were made without the knowledge or consent of her intended husband, and for no other consideration than love and affection. The grantees of Harriet F. Wilcox, now Harriet F. Green, executed deeds to the property to James H. Easterday, who at the time had knowledge of all the circumstances attending the execution of the deeds to them. Oliver Green, the husband, attempts to set

aside these deeds, alleging that the same are fraudulent as to him. The defendant, James H. Easterday, demurred to the petition of plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action. . . .

For the purpose of this case, all the allegations of the petition must be taken as true. Therefore we must assume there was a verbal ante-nuptial contract existing between Oliver Green and Harriet F. Wilcox at the time of their marriage; that the marriage was consummated by Green on account of his reliance upon the ante-nuptial contract; and that Harriet F. Wilcox, now Green, has been guilty of misrepresentation, deception and actual fraud toward Oliver Green before and after her marriage. The question is, whether, under all these circumstances, the deeds delivered subsequent to the marriage can be set aside as fraudulent to the husband. We decided in *Hafer v. Hafer*, 33 Kans. 449, that—

“The statutes of this state recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage, and that an ante-nuptial contract providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced.”

And we further decided that “Marriage is a good and sufficient consideration to sustain an ante-nuptial contract.” Sec. 6, of chapter 43, Comp. Laws of 1879, of the statute for the prevention of frauds and perjuries, provides:

“No action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.”

But for this statute, we suppose it would be conceded that the ante-nuptial contract might be enforced, or at least that the deeds of Harriet F. Green, late Wilcox, attempting to convey, without consideration, all of her real estate, so as to deprive herself of the

power of carrying out her promises and contract, would be invalid as a fraud upon her husband. . . .

In *Glass v. Hulbert*, 102 Mass. 24, it was said:

"The marriage, although not regarded as a part performance of the agreement for marriage settlements, is such in irretrievable change of situation that if procured by artifice upon the faith that the settlement had been, or the assurance that it would be executed, the other parties are held to make good the agreement and not permitted to defeat it by pleading the statute."

In *Petty v. Petty*, 4 B. Mon. 215, the wife, in her petition charged that her husband, being much the elder and in good circumstances, as an inducement to the contract of marriage and as a means of providing for her support in the event of his death, before their marriage promised her that if she would marry him he would immediately after the marriage make a deed of settlement, etc. A few days after the marriage, her husband disclosed to her for the first time that he had been induced by certain persons to make over his property before he married. The court said, in passing upon the case, that "the wife has been fraudulently deprived of the right of dower by the deeds in question; to that extent at least of this interest, if no further, their execution was a fraud upon her and ought not to stand." . . .

Upon the well-established doctrine that fraud takes any case out of the statute of frauds, and the principle declared in *Busenbark v. Busenbark*, we conclude that the deeds in controversy are in fraud of the rights of the plaintiff, and that he is entitled to have them set aside. . . .

DUFFY v. KELLY.

(New Jersey Court of Chancery, 1897, 55 N. J. Eq. 627, 37 Atl. 597.)

The suit is in the nature of one for specific performance. The complainant, by his bill, sets out that he is the owner of a lot of land in Hoboken, known as No. 165 Newark street, and that on the 2nd of October, 1891, he demised the same unto one Adolph Horn, for the term of five years from that day, and the lease contained a clause

in these words: "And it is further agreed that the tenant shall have the option of extending this lease for the further period of five years for the same rent, unless the landlord shall pay a fair price for the building that is to be put on the premises by the tenant, provided three months' notice in writing is given by either party before the expiration of this lease." . . .

PITNEY, V. C. . . . The clause in question is, in effect, a contract on the part of the lessee to convey the building to the complainant, lessor, at his option, at a fair price. This is a necessary implication from the scope and purpose of the contract. If the building was, in fact, so annexed to the land as to be incapable of removal as a trade fixture, then the legal title was in the lessor and no actual conveyance is necessary. If, on the other hand, the lessee has the right to remove it, a formal release of that right is proper. The clause was evidently framed upon the idea that it was not removable, and the provision for compensation was manifestly introduced for the benefit of the lessee by way of protecting him against the loss of the amount invested in the building. It follows that the suit is, in effect, one for specific performance.

The circumstance that the interest here in question may be properly classed as a chattel interest is no objection to the jurisdiction of the court. The power and propriety of the court, in proper cases, to deal with specific performance of contracts for the sale of chattels is established by a series of authorities in New Jersey, the leader being *Cutting v. Dana*, 10 C. E. Gr. 265, followed by *Rothholz v. Schwartz*, 1 Dick. Ch. Rep. 477, and by the later case of *Gannon v. Toole*, 32 Atl. Rep. 702. In the last case, the interest dealt with was much like that now before the court.

But, in essence, the subject-matter here is real estate. It involves the right to the possession of the land itself, as well as of the building which has been erected upon it.

Then I am unable to see how the complainant can have his remedy at law. By his notice given to Kelly, he bound himself to purchase the building at a fair price, and barred himself from declaring the term ended except upon terms of paying for the building. In order to maintain an action at law, it is necessary for him to make a tender of a fair price in advance of his action. And there are two difficulties in the way of that—first, that he has no mode of ascertaining in ad-

vance what a jury will consider to be a fair price, and second, he might not be quite safe in tendering it to either of the two—Kelly, the assignee of the lease, or to the Bavarian Brewing Company, as mortgagee.

The real position of the complainant is that of a person holding a contract to purchase a right of possession of land upon paying a fair price for a building situate upon it. In that respect the case is the converse of *Berry v. Van Winkle*, 1 Gr. Ch. 269, where the aid of the court was asked by the lessee, who had a contract from the lessor to pay him, at the end of the term, the value of improvements to be put upon the premises.

Viewed in the light of a suit for specific performance, the power and duty of the court, where, as here, it is necessary, in order to do justice, to ascertain the fair value of the subject of the sale, must be considered as settled in this court. The subject was considered by Chancellor Green in *Van Doren v. Robinson*, 1 C. E. Gr. 256 (at p. 260), where that learned judge collected the authorities and stated the result thus: "But where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price, or at a fair valuation, the court would direct the valuation to be made by a master, and will enforce the execution of the contract."

It is manifest that, unless the court will undertake to ascertain the fair value of the building, the complainant will be in great danger of losing the benefit of the terms of his contract, and that consideration has influenced the courts in the direction of assuming that duty whenever practicable. This abundantly appears from an examination of the later English authorities. *Pom. Spec. Perf.* § 151; *Fry Spec. Perf.* (3rd Am. ed.) § 346; *Hopcraft v. Hickman*, 2 Sim. & Stu. 130; *Gaskarth v. Lord Lowther*, 12 Ves. 107; *Jackson v. Jackson*, 1 Sim. & G. 184; 22 L. J. Ch. (N. S.) 873; *Milnes v. Gery*, 14 Ves. 400.

The latter was an action for specific performance of a contract to sell an estate at a price to be fixed by two indifferent persons, one to be named by one party and the other by the other party, and if the persons so named should happen to disagree, then these two to choose a third person, whose determination should be final. Two persons were chosen, but were unable to agree, and were unable to agree upon a third person. Complainant filed a bill for specific performance,

asking the court to appoint a proper person to make the valuation, or that the valuation should be ascertained in such other manner as the court should direct. Sir William Grant, master of the rolls, held that the court had no power to fix the price in any other manner except in that mode fixed by the parties, but at page 407 he adds:

"The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value were pointed out. There is nothing, therefore, precluding the court from adopting any means adapted to that purpose."

With regard to the value of the building here in question, I think a fair valuation will be arrived at by taking the actual cost of the building and water and sewer connection, which was \$611, and make a moderate allowance for five years' wear and tear. This I fix at \$61 and fix the valuation at \$550.

As the complainant made his offer too small and the defendant his demand too large, I think it right that each party should pay his own costs.

The decree will be that, upon tender of that sum, the defendant must release all right, title and interest in the premises, without prejudice to the right of the complainant to recover for use and occupation.

BODWELL v. BODWELL.

(Supreme Court of Vermont, 1894, 66 Vt. 101, 28 Atl. 870.)

Ross, C. J. This is a bill brought by the guardians of the minor children of E. B. Bodwell, deceased, praying to have Ida A. Bodwell, the widow of the deceased, compelled, specifically, to perform a postnuptial agreement entered into by her, while covert, with the deceased, in regard to living separate and apart from the deceased, and relinquishing "all right, title, and interest in and to his property and estate." The orators, as the representatives of the minor children, stand upon the rights of E. B. Bodwell, as they existed at the time of his decease. Without attempting to determine whether the contract is such that equity would specifically enforce it under any circumstances, or whether it is fair and just in its provisions for the

defendant, or whether its proper construction would debar the defendant of homestead and dower, and other provisions of the statute for her benefit, in his estate, it is elementary that "he who seeks equity must do equity," or that a party to a contract, or those standing on his rights, to entitle himself to a specific performance of the provisions of the contract which are to be performed for his benefit, must affirmatively establish that he has faithfully kept and performed, or is ready and willing to keep and perform, all the provisions of the contract resting upon him to perform, for the benefit of the other party. The deceased had not kept and performed one of the essential provisions of the contract which rested upon him to perform. By the contract, the defendant Ida A. Bodwell was given the care and custody of their minor son Burleigh W., so long as she should properly provide and care for him. The master has found that she did properly provide and care for him, and that the deceased did not regard this provision of the contract, but, very soon after it was entered into, against her wish, stealthily took the son from her, and not only detained him from her so long as he lived, but in the meantime brought a bill of divorce against her, and therein prayed to be given the custody of the son. He put her to the trouble and expense of defending herself, not only from the charges in the libel, but also from the obtaining a decree for the custody of the son. Under these circumstances, E. B. Bodwell, at the time of his decease, did not stand in such relations to the contract that he could call upon a court of equity to enforce it specifically in his favor. Neither do the orators, who stand on his rights. Decree reversed, and cause remanded, with a mandate to the court of chancery to dismiss the bill, with costs to the defendant in this court.

BUCKLAND v. HALL.

(In Chancery, 1803, 8 Ves. 92.)

In May, 1798, the plaintiff being in possession as assignee of a house belonging to the defendant, in Duke Street, Lincoln's-Inn-Fields, at a rent of £30 per annum, to expire at Midsummer, 1799, a treaty was entered into and concluded for a renewal; and a minute of an

agreement was written by the defendant for a lease at the rent of £35. The defendant to make certain alterations: the plaintiff to do all substantial repairs by the 24th of June, 1801, and the painting etc., by the 24th of June, 1802; then to have a lease signed for seven, fourteen, or twenty one years, at his option, from midsummer 1800. . .

THE LORD CHANCELLOR (Eldon). In a case of this kind the court must take care that, the tenant is not rashly turned out of possession. On the other hand it is too hard against the landlord, to introduce upon the record an averment, that the tenant has some way or other become solvent. With respect to the insolvency, the weight of that objection is more or less in different cases. There is a distinction certainly between a purchase and a lease. In the former instance the bill for specific performance tenders payment of the purchase-money; the latter is very much otherwise; and the court ought not to forget the habit of dealing among mankind with regard to the relation of landlord and tenant. Every man taking a tenant looks to the probability of the rent being paid; and that attention is paid to that circumstance through the whole currency of the lease, that introduces a provision not to assign or underlet without license; and that is often thought of so much consequence, that special care is taken at least as to the end of the lease, that there shall then be a responsible tenant; though it may not have been thought necessary to provide for that in the anterior period. A difference of opinion has, I know, prevailed, whether that is a usual covenant, to be inserted as such, or not. But recollecting, that the lessee remains liable to the determination of the term, but an assignee only during his possession, it is of great importance to the lessor to take care that the lessee shall be a man of substance. Therefore insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an agreement for a lease: the party here seeking an execution beyond the law. Insolvency would be of weight with a jury. Such a question appears never to have been determined; and is of too much consequence to be decided upon motion. I shall therefore only say, that at the hearing in general cases, it would have considerable weight with me, in some cases more than in others. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly. If beyond that he undertakes for considerable expenditure upon the premises, before he is to be placed in the relation of lessee, that is directly

connected as a most important circumstance with the fact of solvency or insolvency. Therefore, where very considerable repairs are to be done by the lessee, his solvency is to be looked to to that extent; for, unless done, before the bill is filed, they are to be done after the decree; not immediately upon tender, as in the case of a purchase; unless the bill can offer the amount of the utmost possible repairs to be paid into court. . . .

THOMPSON v. WINTER.

(Minnesota Supreme Court, 1889, 42 Minn. 121, 43 N. W. 796.)

GILFILLAN, C. J. This is an action to compel specific performance of a contract in the nature of one to convey real estate. The defendant had purchased the land from the state, paying 15 per cent. of the purchase price, and receiving certificates of purchase. February 1, 1886, these parties entered into a contract in writing, whereby defendant agreed that, upon full performance on the part of the plaintiff, he would transfer by deed of assignment the said land certificates. Plaintiff was to pay therefor \$590, according to two promissory notes,—one for \$190, due October 1, 1886, with interest at 10 per cent., and one for \$400, due two years from February 1, 1886, with interest at 8 per cent.,—and pay all taxes and assessments, and the unpaid purchase-money to the state. The plaintiff fully performed this contract on his part. In March, 1886, the parties made an oral agreement, by which defendant agreed to make certain improvements for the plaintiff on the land, by breaking, erecting buildings, and digging a well, for which plaintiff agreed to pay him the cost thereof, with interest; such payment not to be made before the expiration of five years from the time of making the improvements. Afterwards, pursuant to such agreement, defendant made such improvements to the amount of \$500, no part of which has been paid. The plaintiff was insolvent. On these facts the court below denied specific performance.

From the memorandum filed by the court below it appears that the specific performance was refused, in the exercise of what the court deemed as discretionary power, the reasons for so exercising

that power being stated that plaintiff has become insolvent; that the value of the improvements is equal to the purchase price; and that plaintiff can be compensated in damages. The mere fact that a person has a contract for the conveyance to him of real estate does not entitle him, as of right, to the interposition of a court of equity to enforce it. The matter of compelling specific performance is one of sound and reasonable discretion,—of judicial, not arbitrary and capricious, discretion. There must be some reason, founded in equity and good conscience, for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But, whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject-matter of the action, or entirely distinct from it. In this case there is no reason to suppose the contract other than a fair one. The plaintiff has been prompt in performing on his part, and in seeking his remedy. The defendant has a claim against plaintiff, entirely independent of the contract to convey, which claim, by the terms of the agreement under which it arose, was not to become due for more than three years after the time when he was to convey. The possibility that when it becomes due he may not be able to enforce it, by reason that plaintiff's insolvency may continue, does not make it inequitable to enforce this contract already matured. That a purchaser may have an adequate remedy by action for damages, although a reason for not holding what he has done to be part-performance to take the case out of the operation of the statute of frauds, is of itself no reason for withholding the proper remedy, where the contract is valid under the statute. The order is re-

versed, and the court below will enter judgment on the findings of fact in favor of plaintiff for the relief demanded in the complaint.

PYATT v. LYONS

(New Jersey Court of Chancery, 1893, 51 N. J. Eq. 308, 27 Atl. 934.)

ABBETT, J. The bill in this case was filed for specific performance of a contract for the sale of lands. . . .

In this case, if the contract is to be enforced, the complainant was entitled, in equity, to a conveyance of a lot on the corner of Nassau and Witherspoon streets, in Princeton, twenty-two feet six inches wide and one hundred and twenty-nine feet deep, and he was not entitled, in equity, to the "narrow strip" of three feet eleven inches, which was part of Witherspoon street.

The learned vice-chancellor reached this conclusion, and determined correctly upon the evidence in this case, that this complainant never had any right, in equity, to have a conveyance of a lot of more than the twenty-two feet six inches in width. The defendants offered to convey such a lot, and twice, once in May and again in September, 1892, tendered the deed of March 28th, 1892, containing a proper description of a lot twenty-two feet six inches wide by one hundred and twenty-nine feet deep, on the corner of Nassau and Witherspoon streets. The complainant refused to take any deed unless it gave him a lot twenty-six feet five inches in width, and refused to pay the balance of the purchase money unless he got a good title to such a lot as would include the "narrow strip" of land in Witherspoon street.

The relief invoked is not a matter *ex debito jussitiae*; the bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion, and he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part. *Meidling v. Trefz*, 3 Dick. Ch. Rep. 644; *Page v. Martin*, 1 Dick. Ch. Rep. 589; *Blake v. Flatley*, 17 Stew. Eq. 231.

The complainant has not presented a case which brings him within the above rules, and no case has been shown where a court of equity

decreed specific performance after such a refusal as complainant admits in this case. He refused to perform the contract on his part, unless the defendants would do what in equity they were not bound to do.

The complainant cannot, after such a refusal, and after the defendants have sold the premises to another, seek in a court of equity the relief prayed for in this suit. He must be left to his remedy at law. . . .

BISHOP v. NEWTON.

(Illinois Supreme Court, 1858, 20 Ill. 175.)

WALKER, J. . . . Then has complainant a right to insist upon a specific performance of the agreement? This breach of equity jurisdiction is regulated, to a considerable extent, by a sound legal discretion. The rule governing courts was stated by Chief Justice Marshall to be, that when a bill is exhibited by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances; and that a consideration always entitled to great weight is, that the contract, though not fully executed, has been in part performed. 6 Wheat., 528. And, in a subsequent case, the same court lay down the rule that time may be of the essence of the contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication, from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been exceedingly negligent in performing the contract on his part, or if there has been, in the intermediate period, any material changes of circumstances affecting the rights, interests or obligations of the parties; in all such cases, a court of equity will refuse to decree a specific performance, upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this nature, time is not treated by courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable

time, although he has not strictly complied with the terms of the contract. *Taylor v. Longworth et al.*, 14 Pet., 172.

The complainant has brought himself clearly within the principles of these rules. He, in part performance of the contract, paid, on the purchase, one thousand dollars. It is true, he did not pay or offer to pay the next installment on the day, but he did offer to pay twenty days afterwards. While this is not a strict compliance, it is not gross laches or unreasonable delay, when it is remembered that Newton was himself in default, and not in a position to require payment, and we are, therefore, of the opinion that his conduct was such as entitles him to the relief sought. . . .

POMEROY v. FULLERTON.

(Supreme Court of Missouri, 1895, 131 Mo. 581, 33 S. W. 173.)

MACFARLAND, J. The suit is in equity, to enforce the specific performance of the following contract: . . .

Some time previous to this transaction defendant had purchased a large tract of land in the suburbs of the city of St. Louis, of which that in question is a part, for which he agreed to pay the sum of \$80,000. A part of the purchase price was about maturing and defendant was much in need of money to meet these obligations. The land in question was at the time worth more than under the contract plaintiff agreed to pay for it. Defendant agreed verbally with plaintiff to take \$18.50 per front foot if paid in cash. We think there can be no doubt that Reveley was fully advised of defendant's pressing need of money. M. P. Reveley and W. F. Brink were real estate agents occupying the same office in St. Louis. Brink wished to purchase this property, having in view its immediate sale to a third party. He believed he could sell to this party for cash. With these objects in view, and influenced by these considerations, the contract was made, and the copy of the deed explanatory thereof was furnished. Brink was the real purchaser, though the contract was made in the name of Reveley. . . .

At the time the contract was made the real estate market in St. Louis was much depressed and so continued until about 1888. From that time on the appreciation in value was very marked, and at the

trial of this case the land in question was worth four times what it was in 1883. Streets had been put through the property. These streets had been paved with asphaltum, sidewalks had been laid and sewers constructed. Defendant testified, and in that he was not contradicted, that he had expended at least \$30,000 in improvements. It is true he testified that the street improvements were not commenced until about 1890. It does not appear that plaintiff or his assignor paid taxes either general or special on the land, expended any money in its improvement, or did any act indicating claim or ownership from the date of the contract to the commencement of this suit. Under these circumstances, is plaintiff entitled to the equitable relief demanded?

Courts of equity will refuse to decree specific performance of a contract when to do so would be plainly inequitable and unjust. In the early case of *Taylor v. Longworth*, 14 Pet. 172, loc. cit. 174, it was said by Mr. Justice Story: "In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period been a material change of circumstances affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust." In the case of *Holgate v. Eaton*, 116 U. S. 40, Mr. Justice Miller declares this language to have become a legal maxim in this class of cases. . . .

We are well satisfied from the terms of the contract, which required performance by the vendee "not later than May 25," and the circumstances under which it was made, that the vendor intended to make the time of performance an essential part of the contract. We are furthermore satisfied that the vendee expected to be prepared to carry out the contract by the time specified and would have been perfectly willing to make time an essence of the contract. He must have known defendant's urgent need for money, from the low price at which he offered the land and the large discount he was willing to

make for cash. A consideration of all these facts and circumstances convinces us that the parties intended to make the time of performance not only a material, but an essential part of the contract.

The delay in applying for relief may not be, of itself, sufficient grounds upon which to deny granting it, but that, coupled with all circumstances, makes a case in which it would be most inequitable and unjust to require defendant to specifically perform the contract. The relief was, therefore, properly denied by the learned circuit judge, and the judgment is affirmed. . . .

WELLS v. SMITH.

(New York Court of Chancery, 1837, 7 Paige 22.)

THE CHANCELLOR. This bill is filed to compel a specific performance of a contract for the sale of a lot of land in New York, the complainant having failed to perform the contract on his part within the time stipulated. And the only questions are, whether upon an executory contract of sale, parties may make time an essential part of the contract, so that this court will not relieve against a non-compliance at the day; and whether it was the intention of the parties in this case to make the payment of the money on or before the time stipulated an essential part of the agreement.

There cannot be a doubt that it was the intention of the parties in this case to make the time specified an essential part of the contract. It is hardly possible to make language more explicit. The contract was, that if the complainant failed or neglected to perform all or any one of the covenants therein contained on his part, at the time or times therein before limited, then and in such case all the covenants and agreements on the part of the defendant should cease and be absolutely void; and all the complainant's right or interest in the premises either in law or equity should cease, etc. And one of the covenants on the part of the complainant was, to build and enclose a house upon the front of the lot on or before the first of August, or in lieu thereof, that he should on that day pay to the defendant one thousand dollars as the first payment towards the purchase money. The complainant had his election to do one or the other, as was most

convenient for him; but if he did neither, it was unquestionably the intention of both parties that the defendant should be no longer bound by the contract. And although Mrs. Smith afterwards consented to modify the contract, so far as to permit him to pay the whole instead of a part only of the purchase money on the day—he not having attempted to build the house—she gave him fair notice that if he suffered the day to pass, without paying the amount stipulated in the contract, she should avail herself of the condition expressed in the agreement and refuse him the deed. . . .

As to the power of the vendor, or of the purchaser, to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, I have no doubt; though this court may perhaps relieve against a forfeiture where it would be unconscientious to insist upon a strict and literal compliance. Thus if a vendor, after he has received the greater portion of the purchase money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received and the premises also if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment and convey the premises, or to restore the purchase money already paid; after deducting a reasonable allowance for the use of the premises in the mean time.

In this case, however, the interest of the money till the first of August, and the shop which the complainant agreed to leave on the premises if he did not perform his part of the contract at the day, are not probably more than the value of the use of the premises in the meantime and of the chance of gain to the purchaser by the probable increase in the value of the property. They may, therefore, very properly be considered as reasonable stipulated damages for the non-performance of the contract by the vendee at the time fixed upon by the parties, and are not properly a forfeiture. Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact, the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title and the delivery of the possession of the premises at the time contemplated by the purchaser is of essential

benefit, to him; which cannot be compensated by damages which are ascertainable by the ordinary rules of computing damages. It would therefore not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day. . . .

HOYT v. TUXBURY.

(Supreme Court of Illinois, 1873, 70 Ill. 331.)

SCHOLFIELD, J. . . . The rule, time and again announced by this court, is, that a party can not call, as a matter of right, upon a court of equity to specifically enforce the performance of a contract; that its exercise rests in the sound discretion of the court, in view of the terms of the contract of the parties, and surrounding circumstances. A party demanding its exercise, is bound to show he himself has always been ready, willing and eager to perform on his part. . . .

In McKay v. Carrington, 1 McLean, 59, this principle is applied to a contract for the sale of real estate, the court saying: "When the property has not materially changed in value, and the circumstances of the parties in relation to it remain substantially as they were when the contract was made, or was made to have been performed, time is seldom considered material. But where a specific execution of the contract will give the purchaser property greatly deteriorated from the value it bore when he should have received it, it would be unjust to compel him to receive it. Chancery will never interpose its powers, under such circumstances, to carry the contract into effect."

And this must obviously apply with equal force in cases, like the present, where the purchaser is seeking specific performance and the property has, pending the delay of the purchaser to determine whether he will take the title the vendor has, greatly increased in value. See, also, Schmidt v. Livingston, 3 Edwards (Chy), 213; Williams' Admrs. v. Stark, 2 B. Monroe, 196.

It appears, from the evidence, that appellant was a real estate broker, and the contract made by him for the purchase of the property, in controversy, was for the purpose of speculation. The location of the property was deemed favorable for that purpose. Its proximity to a contemplated public park, and the prospective improvements incident thereto, afforded reasonable ground for the expectation that it would materially and speedily appreciate in value. This, however, necessarily depended on a number of contingencies, and time alone could fully determine to what extent the expectations would be realized. There was a reasonable prospect of gain for the purchase, at the contract price, but, at the same time, a possibility of loss.

By the terms of the contract, if the title was found to be not good, appellant was to have back the \$1000 paid at the execution of the contract. If he failed to comply with the contract, he was to forfeit the \$1000 as liquidated damages. Appellant might elect to take the title, notwithstanding his objections to it, but Tuxbury could not compel him to do so. . . .

It is clear, upon the principles before quoted, that appellant was only entitled to a reasonable time in which to determine whether he would take the title Tuxbury had, or reject it, and that he could not keep the trade suspended indefinitely, so as to avail of a rise in the value of the property, or relieve himself from loss by rescinding the contract, in the event of its depreciation and the court below was justified in finding that Tuxbury was authorized to treat the contract as abandoned by appellant.

WEBSTER v. FRENCH.

(Supreme Court of Illinois, 1849, 11 Ill. 254.)

This was a bill filed in the Sangamon Circuit Court, to enforce a conveyance of the Quincy House to the complainants. . . .

CATON, J. . . . There is but one other question made in this case, which we think it necessary to examine. It is objected that the complainants have not actually brought their tender into Court with their bill, and deposited it with the clerk. In this Court, this is in

fact a new question, as now presented, although in three different cases, in all of which the opinions were prepared by myself, it has been stated, that the tender should be kept good by bringing the money into Court; yet in none of these was the question distinctly presented, or necessary to a decision, for in none of them had a sufficient tender ever been made, and, consequently, the question did not undergo that careful consideration which would have been given it, had the case turned upon that point. . . .

The result of my examination of this subject clearly shows that the Court of Chancery is not bound down by any fixed rule on this subject, by which it will allow the substantial ends of justice to be perverted or defeated by the omission of an unimportant or useless act, which nothing but the merest technicality could require. The money may, at any time, be ordered to be brought into court, whenever the rights of the opposite party may require it; but while he is insisting that the money is not his, and that he is not bound to accept it, it would seem to be a matter of no great consequence to him whether it is in the custody of the Court or not. The Court possesses a liberal and enlarged discretion on this subject, by the proper exercise of which the rights of all parties may be protected. In all the precedents which I have examined in cases like this, I do not find a single instance in which the complainant, by his bill, professes to bring the consideration money into Court, although a tender is most generally averred. Even where a bill is filed by a mortgagor to redeem, he does not profess in his bill to bring the money into Court, nor is it usual for him to do so, but he only makes a present offer to pay the money. He might, probably, by tendering the amount due, and by bringing it into Court, stop the interest, but if he does not choose to do this, I do not think a precedent can be found for dismissing a bill for that reason. I can perceive no stronger reason for requiring the money to be brought into Court, in the first instance in this case, than in the case of a mortgage. In the case of a bill of interpleader, where the practice on this subject is much more strict than in any other case in chancery, the rule is not inflexible that the fund shall be deposited in Court, and I have been unable to find a single instance, where even such a bill has been dismissed for the sole reason that the fund was not deposited at the time the bill was filed. Indeed, it has been expressly decided that such a bill is not demurrable, because the plaintiff does not offer to bring the

money into court. *Meux v. Bell*, 6 Sim., 175; 1 Smith's Ch. Pr., 2 Am. Ed. 476; 3 Daniel's Ch. Pr., 1 Am. Ed. 1760.

Without pursuing this subject further, I am satisfied that the expressions used by me in the cases referred to, were not warranted by the law, or at least that they should not be understood as laying down an inflexible rule, prescribing an indispensable condition, which must be complied with before the complainant is properly in Court, or even before the Court will proceed to determine the rights of the parties. It is time enough for the party to bring the purchase money into Court, when he is called upon to do so. . . .

DAY v. COHN.

(Supreme Court of California, 1884, 65 Cal. 508, 4 Pac. 511.)

MCKEE, J. . . . The action was to enforce the specific performance of a parol agreement to convey the legal title to a town lot.

The record of the case shows that the plaintiff proved the agreement as averred in his complaint; that under the agreement he entered into possession of the lot, by and with the consent of his vendor, and expended several hundred dollars in building upon it a dwelling-house and out-houses, which were occupied by himself and his tenants; and that, during his occupancy, he made occasional payments upon the purchase price of the lot, which were accepted by the vendor on account, and the balance he tendered and demanded his deed; and he still was ready and willing to pay what was due, but the defendant, to whom the lot had been conveyed by the vendor, refused to accept the money or to execute a deed.

Possession of a lot of land under a parol contract for the sale thereof, the expenditure of money in the improvement thereof, and partial payments of the price stipulated to be paid for it, constitute part performance of the contract which takes it out of the statute of frauds (§ 1972, Code Civ. Proc.), and entitles the vendee to specific performance of the contract itself, unless there are circumstances in the case which would render it inequitable for a court of equity to grant relief.

There is nothing in the circumstances of the case which shows laches on the part of the plaintiff in the performance of the agreement. No

definite time was named for the payment of the price to be paid. By the terms of the agreement the money was to be paid from time to time "as the plaintiff earned the same." Time, therefore, was not of the essence of the agreement, nor was it made so by notice or demand for the payment of the money at any particular time. The vendor was content to let it remain bearing interest, and he always accepted any payments which were made by the plaintiff in performance of the agreement. The last of such payments was made in 1881, two years before the commencement of the action in hand. There was, therefore, no repudiation or abandonment of the contract by the plaintiff; and as he was all the time, until the conveyance to the defendant, in the actual possession of the lot under the contract, his equitable right to compel performance of it was not barred by the Statute of Limitations. (*Love v. Watkins*, 40 Cal. 547; *Willis v. Wozencraft*, 22 Cal. 608; *Millard v. Hathaway*, 27 Cal. 119.)

WEBB v. HUGHES.

(In Equity, 1870, L. R. 10 Eq. 281.)

SIR R. MALINS, V. C. . . . This bill was filed for the specific performance of the contract for sale of The Cedars on the 26th of May, 1869. The case set up by the Defendant is that time, if not by the terms of the agreement, at all events by the circumstances of the case, was of the essence of the contract. One stipulation in the agreement was that the Plaintiff should have possession of the property on the 26th of February if his purchase-money was then paid.

The circumstances were these: The Defendant came of age in the year 1868, and required a residence immediately for himself and his mother. It is said that the Plaintiff was aware of that fact, and the Defendant says he informed the Plaintiff that if he could not obtain possession of the property by the time stated in the agreement, it would be of no use to him.

Now, the rules of this Court are plain. A purchaser may, by the terms of the agreement, make time the essence of the contract, but it requires a very strict stipulation to effect that object; or he may make time the essence of the contract, by a notice at any time during the

progress of the negotiations. If, therefore, time was not an essential part of the contract, the Defendant might have made it so by giving the Plaintiff notice to that effect. In my opinion the agreement in this case did not make time the essence of the contract, because the very condition shews that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase; but upon payment of the money, the purchaser was to be entitled to possession of the property. It was, therefore, evidently contemplated that the time might extend beyond the day fixed for completion. But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if title is not shewn. What, then, would have been a reasonable time? What was the Defendant's position on the 7th of April? The solicitors had been negotiating from the 26th of February for completion of the contract, and on the 7th of April the purchaser does not give the vendor even twenty-four hours' notice of his intention, but sends a notice of his immediate abandonment of the contract. If, instead of that, he had given notice that if the vendor did not perfect his title within a reasonable time, then he would abandon his purchase and would require a return of his deposit, that would have been sufficient; but he had no right, under the circumstances, to give notice of immediate abandonment. . . .

In *McMurry v. Spicer* Law Rep. 5 Eq. 527, I had occasion fully to consider the question, and there I stated (p. 543): "The purchaser is bound to give the vendor a reasonable time for completing his title. No absolute rule can be laid down as to what is a reasonable time. That must depend upon a variety of circumstances. . . . The notice here was a week, which I think was too short a time. He was

bound to give him a reasonable time, and I think that a week, or even a month, was too short; and the notice was ineffectual for the purpose of rescinding the contract, upon the ground of the time not being a reasonable time." On this rule, therefore, it was not competent for the purchaser to give notice of immediate abandonment of his contract. . . .

MARSH v. BUCHAN.

(New Jersey Court of Chancery, 1890, 46 N. J. Eq. 595, 22 Atl. 128.)

On appeal from a decree advised by John R. Emery, one of the advisory masters, who filed the following conclusions:

This is a bill by a purchaser against a vendor, for the specific performance of a written agreement to convey lands. . . .

The present case is one where the principal applies for a specific performance of the contract procured, as I have found, by his agent's fraud.

This relief, being purely equitable, will be denied where the situation of the parties requires perfect good faith and openness of dealing in making the contract, and these have not been observed.

In *Hesse v. Briant*, 6 De G., M. & G. 623, this rule was laid down as applying to a case where a solicitor was acting as agent for both vendor and purchaser, and the court of errors and appeals, in *Young v. Hughes*, 5 Stew. Eq. 372, 385, approved of the rule of this case. In the present case, it seems to me, that the defendant, before reposing in Sleight the confidence of employing him as her agent, and before making this contract, had not received that fair, open-disclosure of Sleight's relation to the vendors to which she was entitled, and that on this account also, the equitable relief of specific performance should be denied.

I cannot agree with complainant's counsel in his contention, that Sleight's duty to disclose to the defendant his agency for the purchasers, did not arise until after the acceptance of his employment as her agent, and was, therefore, only a breach of his duty to her as her agent, for which she must look to him alone, and for which the complainant should not be punished by refusal to decree the execution

of the contract. Sleight's duty, as I understand it, was to disclose his relations with the purchasers before accepting the agency from defendant. . . .

Per Curiam:—The decree affirmed, for the reason given by the advisory master.

BROWN v. SMITH.

(Supreme Court of Iowa, 1902, 89 N. W. 1097.)

PER CURIAM. The plaintiff held a contract for a quarter section of land in Ottertail county, Minn., from the D. S. B. Johnston Land Company, of the value, according to the evidence, of not exceeding \$4 per acre, and claims to have entered into an agreement with defendant by the terms of which, in consideration of a deed to defendant of such land, on which was to be executed a mortgage of \$500 to said company by defendant, the latter undertook to convey to plaintiff his dwelling house and two lots, of the estimated value of from \$1,600 to \$2,000, subject to a mortgage to a building and loan association of \$750. The defendant admitted as a witness that he made the contract, but insists that he was induced to do so, by the misrepresentations of the plaintiff, and that he promptly repudiated it upon discovery that the land was not as it had been represented. April 2, 1899, Brown wrote of the land: "It is good soil, only about two and a half miles from Elkhart, on the G. N. Ry.;" and again, on April 9th: "I wish you would read an article in today's St. Paul Dispatch about Minn. lands. It is better than anything I can say, and I have been studying it for three years." Defendant testified that plaintiff told him that the land was good tillable land, which cost him \$10 per acre, and was located 2½ miles from the above station, and that in making the agreement he relied upon these statements. The plaintiff denies this, and testified that he advised defendant that he knew nothing of the land, and that the latter must learn for himself. But, in view of plaintiff's letters, the court might well have accepted defendant's testimony as the more reliable. True, the defendant, who knew nothing personally of Ottertail county, made inquiry concerning land, but, through probable mistake as to its location, was misinformed as to its

character and value. If he was influenced by the mistaken advice, it does not follow that he did not rely on plaintiff's misrepresentations, so that but for them he would not have entered into the agreement. The land was, in fact, 6 miles instead of $2\frac{1}{2}$ from a railroad station, including a pond or lake of about 25 acres, the north half hilly and sandy, all save the lake, and 15 acres of slough, covered with stumps and brush, and only 80 acres, after being cleared that could be cultivated. Certain it is that with correct information defendant would not have considered a proposition of exchanging property in which his interest was from \$850 to \$1,250 for a \$140 interest in such land. As the plaintiff was undertaking to obtain an unfair advantage over defendant, and this, in so far as successful, was accomplished by deceit, we have no notion of lending our aid to enable him to carry out his enterprise of getting something for practically nothing.

AFFIRMED

HETFIELD v. WILLEY.

(Supreme Court of Illinois, 1883, 105 Ill. 286.)

MR. CHIEF JUSTICE SCOTT. . . . The bill is to enforce the specific performance of a written agreement between complainant and defendant, concerning a sale by the former to the latter of his interest in the firm of Frank Field & Co., a firm then and previously engaged in manufacturing crackers and confectioneries. As respects the terms of the agreement there can be no controversy, as it is signed by the respective parties. It obligated defendant to pay complainant \$5000 for his interest in the firm of Frank Field & Co.,—\$1000 of which sum was to be paid on or before the 1st day of August next after the making of the contract, \$2000 in one year and \$2000 in two years, the latter payments to be evidenced by two promissory notes, bearing interest at the rate of eight per cent per annum, which said notes were to be secured by a mortgage on lands of defendant described in the bill. On the hearing, the circuit court decreed a specific performance of the contract, and that decree was affirmed by the Appellate Court for the First District. The correctness of the decision of the latter court is called in question on this appeal of defendant.

The defense made is, that the contract is not fair,—that defendant was induced to enter into it under a misapprehension of the real facts, and that complainant contributed to that result by statements not entirely candid or accurate, upon which defendant confidently relied, and was thus overreached in the transaction. . . .

It appears defendant performed the contract in part by making payment of most of the first installment agreed to be paid, and then ceased to do more. Shall he now be compelled to go forward and complete his agreement? To do so would undoubtedly subject defendant to very serious loss. On the principle just stated, equity will hesitate to compel the execution of a contract the performance of which would be oppressive on the obligated party. Considering the whole evidence contained in the record, it is impossible to escape the conviction it would subject defendant to considerable loss to compel him to perform the contract under the circumstances. The assets of the firm were not near so valuable as defendant supposed them to be. The concern owned many more local bills than he had any reason to anticipate. It is said he should have examined the books to have ascertained more accurately the value of the firm assets. There are two answers to this suggestion: First, the books did not show to a casual observer the exact condition of the accounts due the firm, whether good or bad; and, second, the books kept by the regular book-keeper did not show all the local bills owing by the firm. That class of bills only appeared on a private memorandum book kept by one member of the firm, who had charge of that branch of the business. This fact was known to complainant, and was not known to defendant at the time of the sale. When complainant referred defendant to the books for information, he did not advise him where the private memorandum book containing an account of the city bills owing by the firm could be found. Had defendant examined the books as any prudent man would have done, it will be presumed he would have examined only such as were kept by the book-keeper of the firm. It could hardly be expected he would have inquired whether the several partners kept private memoranda of matters pertaining to the firm business. It is proved there were several thousand dollars of city

bills owing by the firm that did not appear on the book-keeper's book. The amount was certainly sufficient to very materially affect the value of the firm assets. Of these city bills defendant did not seem to have had any knowledge when he executed the written agreement it is sought by this bill to enforce by a decree in chancery. Complainant had full knowledge, and he ought to have communicated to defendant that information. He must have known the amount of the city bills very materially affected the value of his interest in the firm he was selling to defendant. In this respect he does not stand so fair that he may invoke the aid of a court of equity.

It will be remembered that the contract was made on the 6th day of July, 1880, and it was some time in October before defendant refused to perform it, and offered to rescind the agreement. That, it is said, was too late; that he should have discovered sooner he had been overreached, and offered to rescind the contract. That may be, and doubtless is, true; but defendant is not asking the aid of the court of equity to enable him to rescind the agreement. Nor is it a material inquiry now whether defendant could rescind the contract after the lapse of so great a period. A more serious question, and one with which the court has now to deal, is, whether complainant has shown a contract so fairly obtained, and so just, that he may invoke the aid of a court of chancery to compel a specific performance. In view of all the circumstances in evidence it can hardly be said that he has. His contract with defendant may be a legal one, and defendant may be required to abide it or answer in damages. That question need not now be determined. Conceding that agreement is obligatory on both parties, under all the circumstances it seems most proper they should be referred to the law courts to adjust the difficulties between them. Whatever claim complainant may have against the defendant, arising out of the agreement, may be compensated by damages recoverable in an action at law. It is no answer to this view of the law to say that complainant may have told defendant, in the office of the lawyer who prepared the papers, he did not know what his interest in the firm was worth, and that he wanted it understood he was selling his interest, whatever it might be, for the sum named in the contract. He may have told him all this, and yet if he obtained an unfair contract from defendant by failing to disclose material facts affecting the value of the interest he was selling, equity will not decree the execution of the

agreement in his favor. It will leave him to his remedy at law, whatever it may be.

The judgment of the Appellate Court will be reversed and the cause remanded.

ISAACS v. SKRAINKA.

(Supreme Court of Missouri, 1888, 95 Mo. 517, 8 S. W. 427.)

BLACK, J. This is a suit brought by Isaacs for the specific performance of a written contract, dated February 17, 1882, and signed by the parties therein named. The contract is in the following words: "William Skrainka and Claus Vieths agree to take all the property of J. L. Isaacs now proceeded against on special tax bills in their favor and against said property, before Justice Taaffe and in the circuit court, city of St. Louis, at fourteen hundred dollars, and J. L. Isaacs agrees to convey to them said property by quit-claim deed for said sum." . . .

The substance of the defence is, that there were other outstanding tax bills against the property for other improvements, amounting to about one hundred and fifty dollars; that Isaacs fraudulently concealed the existence of these tax bills, and represented the property to be free from such liens. . . .

The defendants in taking the property at fourteen hundred dollars subject to their tax bills and taxes for 1882 were to pay the full value of the property. They had information that led them to believe that work had been done for which other tax bills could be issued. It is conceded on all hands that the taxes for 1882 were considered, and it is reasonable to believe that other incumbrances were spoken of; and the fact that Isaacs would not make a warranty deed makes it the more probable that inquiry was made in respect of other incumbrances. Three witnesses say that Isaacs said the property was free from such liens. He denies that he made the representation, and two witnesses, who were in a position to hear, say they heard no such representations. It is a familiar rule that where the witnesses are equally credible, the positive evidence that a given thing was said is of more weight than that of others who say they did not hear the alleged statement. *Henze v. Railroad*, 71 Mo. 639.

Giving to the finding of the court due consideration, still we can come to no other conclusion than this, that Mr. Isaacs did lead the defendants to believe the property was free from other liens, and that this led them to agree to take a quit-claim deed. While the representations may not be such as would support an action at law for fraud and deceit, still it must be remembered that this is an action for specific performance prosecuted by the vendor. Fry says: "In equity, however, it furnishes a good defence to a suit for specific performance that the plaintiff made a representation which was not true, though without knowledge of its untruth, and this even though the mistake be innocent." Fry on Spec. Perf., sec 432. This distinction is pointed out in *Dunn v. White*, 63 Mo. 182. It is held that it requires much less strength of case on the part of a defendant to resist a bill to perform a contract than it does on the part of the plaintiff, to maintain a bill to enforce specific performance. *Veth v. Gierth*, 92 Mo. 97. To defeat the specific performance of a contract it is enough that the representation was material, was actually untrue, was relied upon, and did mislead the other party. It need not have been made with an intent to deceive. Pom. Spec. Perf. secs, 217, 218.

We do not think the fact that defendants were to take a quit-claim deed is of any controlling importance. Fry says: "The circumstance that the vendor sold 'with all faults,' though it may serve to put the purchaser on his guard, will not enable the vendor to say that the purchaser did not rely on his representation, or prevent the purchaser from avoiding the sale, if the representation was false." Fry on Spec. Perf., sec. 455. Our conclusion is, that the plaintiff is not entitled to specific performance so long as the property remains incumbered by these tax bills, amounting to a hundred and fifty dollars or thereabouts. As the judgment must be reversed, the cause will be remanded; for while the title may not have been perfect when the suit was commenced, still specific performance may be decreed, if the title be perfected before judgment or decree. *Lockett v. Williamson*, 37 Mo. 389.

Judgment reversed and cause remanded. All concur.

DURRETT v. HOOK.

(Supreme Court of Missouri, 1844, 8 Mo. 374.)

TOMPKINS, J. On the eleventh day of June, in the year 1838, William Hook commenced this suit against Richard Durrett and Edmund McAlexander, in the Circuit Court of Saline county, on the chancery side thereof. In his bill he states, that on the 25th day of October, 1834, Richard Durrett made and executed to Edmund McAlexander his writing obligatory, by which he bound himself to execute and make to said McAlexander a good and lawful deed to a certain tract of land in said county, containing one hundred and twenty acres; and that, for a good and valuable consideration paid by Elijah Hook and William Hook, the complainant, the said McAlexander assigned to them the said writing obligatory; and the said conveyance having to be made by the said Richard Durrett on demand, and Elijah Hook, one of the assignees thereof, having departed this life on the first day of July, 1835, the complainant, William, on the first day of January, 1838, demanded of the said Durrett a deed for the same, according to the terms of the said writing and the said Durrett refused to make the same, &c.

The complainant further alleges, that he is sole devisee and executor of the said Elijah Hook. . . .

The defendant in error contends, that as Benjamin L. Durrett, if he had brought an action against the complainant, Hook, or against McAlexander, on the agreement of pay \$280 in time specified, i. e., two or three days, would, under the statute of set-off, be compelled to receive the notes by him made to Hook in pay, therefore, when Hook, by his bill in chancery, prays a specific performance of the contract to convey land, Durrett shall be compelled to take the consideration to be paid for the land in his own notes. I cannot perceive that the one is a consequence of the other. . . .

But if we admit, for the present, that a court of equity could correctly compel a defendant, who had promised to convey for a consideration in money, to receive his own notes in payment for the land, yet the court will always see that the person who prays its aid comes in with clean hands. In this case, Hook first introduces his complaint

with the most impertinent and irrelevant charge that the title to this land was held by Richard Durrett to deceive and defraud the creditors of Benjamin L. Durrett; that he, B. L. Durrett, was largely indebted, and owed Hook a large sum of money. He next introduces this said McAlexander, whom he had released in order to render him competent, to prove his own unworthiness. McAlexander, as above stated, declares that in the treaty for this land he had cautiously concealed from B. L. Durrett that the first payment (\$280) was to be made in his own (Durrett's) notes, and that he did not believe that Durrett would have agreed to sell him the land if he had not expected to receive the first payment in cash, and the statement of this witness is sufficient to induce any one to believe that it was intended by Durrett that the delivery of the deed and the payment of the sum of \$280 should be simultaneous acts. But as it seems, he takes up the deed and goes off hastily, observing, that in two or three days he would pay the money to B. L. Durrett. He gave no written promise to pay the money. No man of business habits would have suffered the bond to be carried away under such circumstances, nor would any honest candid man have attempted such an act. Mr. Hook not only receives this obligation by assignment stained with the grossly improper conduct of his assignor; but his own witness, this said McAlexander, proves that he prompted the witness to the act. If the conduct of McAlexander had been otherwise honest, a delivery of the bond by Durrett would be presumed, but as the case now is in evidence, a jury would be very easy indeed to find a delivery of the bond. . . .

CALDWELL v. DEPEW.

(Supreme Court of Minnesota, 1889, 40 Minn. 528, 42 N. W. 479.)

MITCHELL, J. Action to compel specific performance of a contract of sale of real estate. The terms of the written agreement were that defendant sold and agreed to convey the property "for the sum of seven hundred fifty dollars, upon the following terms: Purchaser to pay the city assessments for grading Minnehaha street, (\$205) such payment to constitute part of the above sum of \$750, and also to assume the mortgage of \$300 and accrued interest, (\$12) now on record against said lot, as part of said \$750; balance of said \$750, after

deducting said assessments and said mortgage, to be paid in cash, on delivery of deed." The defendant in his answer, alleged that the actual agreement was that plaintiff was to pay for the property \$750 in cash, and, in addition thereto, assume payment of the mortgage and assessments referred to; that plaintiff undertook to reduce this agreement to writing, and drew up a contract which he presented to defendant, stating and representing to him that it contained the precise terms of this agreement, and then pretended to read it and did read it to him as though it embodied such agreement; that in ignorance of the truth, and misled by the statements of plaintiff, and supposing that plaintiff had correctly reduced the agreement to writing, he executed the contract without reading it. Then follows a somewhat equivocal allegation to the effect that if plaintiff really believed that defendant intended to sell his property for \$750, the incumbrances to be deducted therefrom, he was acting under a mistake of fact, but, if he correctly understood the terms and conditions of said agreement, as defendant believes he did, then he committed a gross fraud. The relief prayed for is that the contract be cancelled and adjudged void on the ground of such fraud or mistake. . . .

But we are clear he has made out no clear case for relief. There is no evidence that plaintiff was guilty of any fraud, concealment, or misrepresentations, or took any unfair advantage of defendant. The defendant is a man of mature years, some business experience, and of at least ordinary intelligence and education. The terms of the writing are explicit, unambiguous, and not subject to any doubtful or double construction. In fact they are so very clear and explicit that no man with his senses about him could misapprehend them. The defendant was capable of reading the contract, and had ample opportunity of doing so, and of examining it as fully as he desired, before executing it. It is undisputed that he either read it over himself with the plaintiff or that the plaintiff read it over to him, before he signed it, and, if the latter, there is no evidence that plaintiff did not read it correctly to him. Defendant nowhere testifies that he understood, when he signed it, that it contained any different or other words or language from those that are actually in it. The most that can be claimed for his testimony is that he did not understand the meaning or legal effect of the language as written. No excuse is shown for any such misunderstanding, and the mistake, if any, must have been due solely to defendant's own

gross carelessness and inexcusable inattention. There is nothing unconscionable or hard about the contract, unless it be the inadequacy of the price, and this is not so gross as to be evidence of fraud. Upon the trial plaintiff testified positively that the writing correctly embodied the exact terms of the actual agreement of the parties. The only direct evidence opposed to this was the oath of the defendant. We know of no rule of law that will permit a man to be relieved from his contract under such circumstances. If, on such a state of facts, a person can evade performance by merely saying that he did not know what he was doing, or did not understand the language of the instrument which he executed, written contracts would be of little value.

There are many cases where equity will refuse to enforce the specific performance of an agreement against a party who entered into it under a mistake, although the plaintiff was not guilty of any improper conduct, and the mistake was solely that of defendant. When and under what circumstances such mistakes are relievable it would be impracticable, as well as unsafe, to attempt to enumerate. But one principle will, we think, be found to run through all the cases, viz., it must not be a mistake due solely to the negligence and want of reasonable care on the part of him who asks for relief. Where there has been no fraud or misrepresentation, and the terms of the contract were unambiguous, so that there was no reasonable ground or excuse for a mistake, it is not sufficient, in order to resist specific performance, for a party to say that he did not understand its meaning. Fry, *Spec. Perf.* § 733; Waterman, *Spec. Perf.* § 358; Kerr, *Fraud & Mistake*, 407, 413.

JUDGMENT REVERSED

C., B. & Q. R. R. v. RENO.

(Supreme Court of Illinois, 1885, 113 Ill. 39.)

CRAIG, J. In 1858, one Abner Reeves owned lots 26 to 46, inclusive, in block 63, in school section addition to Chicago, bounded on the north by Forquer street, on the east by Beach street, on the south by Taylor street, and on the west by an alley. In the year 1858, the Pittsburg, Fort Wayne and Chicago Railway Company, under the authority of an ordinance of the city of Chicago, constructed its

tracks on Beach street. The tracks so constructed were also used by the Chicago and Alton Railroad Company, and, as appears from the record, were the main tracks running to the passenger depot of the two companies. Soon after these tracks were laid, a switch was built on Beach street, which connected the tracks of the Fort Wayne company with tracks owned by Reeves upon his lots, by means of which, cars passing over the Fort Wayne and Alton roads were switched upon Reeves' premises, which were used by him as a coal and lumber yard. In 1875 Reeves died, leaving Sarah A. Reno and Euginia M. Little, two of his heirs, who purchased the interest of the other heirs in said premises. After they acquired title their husbands, under the firm name of Reno & Little, occupied a portion of the lots as a coal yard. On the 28th day of July, 1880, Mrs. Reno and Little sold the Pittsburg, Fort Wayne and Chicago Railway Company lots 32 to 40, inclusive, in block 63, for the sum of \$35,000, being one hundred feet each side of lots 26 to 46. The contract of sale was reduced to writing and contained the following clause: "And it is further so agreed between the parties hereto, that said second party shall, on taking possession of the premises as hereinbefore described, restore all the switch connections now existing between said second party and said first party, or any of them, and continue to them the use of the same, hereafter as heretofore." . . . The Fort Wayne and Alton companies, after taking possession of the premises conveyed to them, restored the switch connections, as provided in the contract of sale; but the Burlington road, upon entering into possession of the premises conveyed to it by Layng, removed the switch connections and tracks which crossed the premises conveyed to it, and constructed upon said premises seven tracks, which it has used and operated ever since. After the Burlington road had removed the tracks which formed the switch connections, the Alton and Fort Wayne roads were requested to restore the switch connections, as provided in the written contract of sale, but the railroad companies declined to comply with this request, and Sarah A. Reno, and her husband, Charles A. Reno, Euginia M. Little and Jacob H. Little, her husband, filed a bill for a specific performance of that part of the contract of sale providing for a switch connection over the premises. . . .

In *Chicago and Alton Railroad Co. v. Schoeneman*, 90 Ill. 258, which was a bill brought by certain parties to compel the railroad company

to construct and maintain a certain swing drawbridge, in conformity with an agreement in that regard, it was declared to be a settled principle that a specific performance of a contract is not to be decreed as a matter of course because a legal contract is shown to exist, but it rests entirely in the discretion of the court, upon a view of all the circumstances of the case. In the same case it was also held: "Where the effect of the specific performance would be to impose upon the defendants a large expenditure and heavy burden, and inconvenience to public interests, without any practical benefit to the other party, a court of equity, in the exercise of its discretion, will refuse to decree it, and leave such other party to whatever remedy he may have at law for a breach of the contract." . . .

The passenger and freight depots of the Burlington road are located three blocks north of the premises owned by appellees, and the seven tracks constructed by the Burlington road on the premises conveyed by Layng to it, are the only tracks owned by the company where its freight and passenger trains can be made up. The Burlington road has invested in freight and passenger depots about \$1,500,000. Thomas L. Potter, general manager, whose evidence is not contradicted, testified that the passenger tracks are used continually all times of the day. Trains are arriving and departing all the time, and every train that comes in has to be made up on those tracks. He also testified that two hundred freight trains a day pass over the tracks, in and out. In answer to a question as to the effect of the construction of switches across the tracks would have upon the business of the road he testified that it would ruin the tracks for business. Indeed, it appears from the evidence that it would be impracticable to operate the proposed switches over the Burlington tracks, on account of the constant use that is made of these tracks by the Burlington road. It seems plain from the evidence, that the construction of the proposed switches across the tracks of the Burlington road would seriously embarrass its operation at that point. The effect could not be otherwise than to delay trains carrying both passengers and freight, and endanger their safety. The carrying of the mails would be retarded, and, indeed, the commercial business of the country would, to a great extent, be disturbed. These are matters in which the public, as well as the Burlington road, have an interest, and we are satisfied, from the evidence, that if the decree should be sustained the public business of the country would be seriously damaged.

Under such circumstances, and where such results are to follow, would it be proper for a court of equity to decree a specific performance of the contract? The decree would impose upon the Burlington road a large expenditure of money and a heavy burden, and would be a detriment to the public interest, and it is condemned under the ruling in the Schoeneman case, *supra*. The decree would also produce hardship and injustice to one of the parties, and can not be sustained under the ruling in *Willard v. Taylor*, *supra*. Nor will the denial of relief in equity operate detrimental to the rights of appellees. If they have been damaged by a breach of the contract they have an ample remedy at law, in an appropriate action. Nor will the denial of the relief prayed for in the bill destroy the business of appellees, or destroy the use of the property as a coal yard. The record shows that the Burlington road has laid tracks immediately adjoining appellees' property, which tracks are used by the company, and connect with its main line, and the main line connects with all the roads leading into the city. Section 5, article 13, of our constitution, requires that "all railroad companies shall permit connections to be made with their tracks, so that any such consignee, and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad." Under this provision, appellees' property, as a coal yard, may, if they so desire, have switch connection with the Burlington road, and being so connected, they will also have connection with all other roads in the city. Indeed, in the answer the Burlington road sets up that its tracks connect with the Fort Wayne and Alton roads, and all other lines in the city, and offers to connect its line of road with the premises of appellees.

After a careful consideration of all the evidence in the record, we are satisfied that the decree of the Superior Court is not right. The judgment of the Appellate Court will therefore be reversed, and the cause remanded.

JUDGMENT REVERSED.

GODING v. BANGOR & AROOSTOOK R. R.

(Supreme Court of Maine, 1901, 94 Me. 542, 48 Atl. 114.)

WISWELL, C. J. The defendant's railroad extends through the plaintiff's farm. The right of way therefor was obtained by a

deed from the plaintiff to the railroad company, for a consideration named therein of one hundred and fifty dollars. But the plaintiff claims that there was an additional consideration; that the defendant's agent who procured the conveyance of the right of way and who agreed with the plaintiff in relation to the terms for such conveyance, promised in behalf of the company, as a further consideration therefor, that the railroad company should build and maintain a farm crossing on the plaintiff's farm across the railroad track. In this bill in equity, the plaintiff seeks a decree for a specific performance of this alleged contract. The case comes to the law court upon report.

The plaintiff's contention is denied by the defendant and there consequently arises an issue of fact about which there is considerable controversy between the parties. But we do not deem it necessary to determine this question. Assuming, without deciding, that the alleged agreement was made as part of the consideration for the conveyance, we do not think that specific performance should be decreed.

The granting of a decree for specific performance is always discretionary with the court. The contract relied upon in any case may be proved in the most satisfactory manner, and still there may be reasons why the court, in the exercise of its discretion, should not compel specific performance of that contract. We think that such reasons exist in this case, and that before a court should compel a railroad company to build and maintain a grade crossing over its track, except in cases where public convenience may require it, or perhaps where there might be very great individual inconvenience if it were not ordered, the court should be satisfied that the danger to public travel will not thereby be much increased, or that the additional burden placed upon the railroad company would not be greatly disproportionate to the benefit that would be derived by the individual.

Very much is required of railroads to meet the demands of the public for the rapid transportation of passengers and freight, to comply with which the utmost diligence must be exercised and everything that affords unnecessary opportunities for danger must be done away with. A grade crossing over a railroad track is a place of recognized danger, and every additional crossing necessarily increases, to some extent, that danger. The time has not yet arrived when such crossings can be dispensed with altogether, at least in sparsely settled communities, but they should not be unnecessarily increased for the

mere convenience of an individual. At least, we think, the court should not compel the maintenance of such a crossing unless good and sufficient reasons exist therefor.

In this case, in the opinion of the court, the benefit to be derived by the plaintiff, if a decree were granted, would be slight in comparison with the additional burden placed upon the railroad company, and the danger to travel upon the railroad would be considerably increased. It appears that just north of the place of the proposed crossing there is a cut for a distance of eight hundred and seventy feet, through which the railroad track runs on a curve, so that a train coming south would enter this cut near the northerly limit of the plaintiff's land and continue on a curve all the way through this cut until it reached the place of the proposed farm crossing, which, because of the curve and cut, would be shut out from the view of the approaching train. It is argued, and it seems to us with much force, that upon this account the proposed crossing would be much more dangerous than under other conditions. South of the place of the proposed crossing, and only two hundred and thirty feet distant therefrom, there is already a highway crossing over the track, so that if this crossing were ordered, there would be two grade crossings within a distance of two hundred and thirty feet. And by reason of this highway crossing over the railroad track, the plaintiff can, with slight inconvenience use that crossing for his purpose.

For these reasons we do not think that the relief asked for should be granted. We are, perhaps, more ready to come to this conclusion because of the fact that the plaintiff is not without ample remedy. If he is right in his contention, he may recover adequate pecuniary compensation for any and all damages that he has sustained by reason of the failure of the company to perform the contract made by its authorized agent in this respect.

As we have come to this conclusion, for the reason above stated, and not because of a decision adverse to the plaintiff upon the issue of facts, the bill should be dismissed without costs.

CHUBB v. PECKHAM.

(New Jersey Court of Chancery, 1860, 13 N. J. Eq. 207.)

THE CHANCELLOR. On the 7th of April, 1855, William Chubb and Lydia, his wife, by deed of that date, conveyed to their

two children, William F. Chubb and Emma Peckham, a small farm, in the county of Somerset, containing about 46 acres of land.

By an agreement of even date with the deed, under the hands and seals of their children, made between the children, of the one part, and their parents, of the other, the children agreed, in consideration of the conveyance, to provide for the support and maintenance of their parents, and each of them, in a comfortable manner, to provide and furnish each of them with proper and suitable clothing, food, medicine and medical attendance, when sick, and to find a comfortable place to live in—all to be according to their age and situation in life—for and during their natural lives and the life of the survivor of them. The children further agreed to accept the title which the father had in the premises; and in case of any adverse claim of title, to be at the expense of defending the title which they thus acquired.

This bill is filed by the father against the children, and charges a failure upon their part to perform the contract, and asks either that the contract be rescinded, and the lands re-conveyed to the complainant, or that a specific performance be decreed.

A decree *pro confesso* is taken against the son. The daughter alone answers. She admits the contract, alleges that they took the title at her father's request, and solely for the purpose of aiding her aged parents; that she has received nothing whatever from the farm; that its entire proceeds, together with considerable sums advanced by herself, have been appropriated to the support of her parents; that at the time of the contract it was understood and agreed that the father should remain upon the farm, and assist in its cultivation, until a sale could be affected; that the proceeds of the farm, and the limited means of the defendant, are utterly inadequate to support her parents elsewhere than on the farm, and with their assistance. She proffers herself ready and willing to reconvey the land, if the sums she has advanced under the contract are repaid to her.

The evidence in the cause shows that the farm was conveyed to the defendants, not at their request, but at the solicitation of the complainant, and that the title was reluctantly accepted by Mrs. Peckham, the daughter; that she has derived no benefit from it, but that the contract into which she entered upon taking the title has involved her in serious trouble and pecuniary loss. The evidence, moreover, tends to confirm the allegation of the answer, that she accepted the title,

and entered into the contract for her parents' support upon the faith of a parol agreement, cotemporaneous with the written contract, that her father would remain upon the farm, and assist in its cultivation until it could be advantageously sold, and the proceeds applied to his support, and the support of his wife, at such place as they might choose to reside. This evidence, however, is inadmissible to relieve her from the obligation of the written contract. It is in direct conflict with the express terms of her written engagement, by which it is stipulated that the parents, or either of them, should be at liberty to reside in the city of New York, or elsewhere. Evidence of a cotemporaneous parol agreement is inadmissible to alter the terms of the written contract.

However unfortunate or oppressive may be its terms, the parties must abide by their engagement as it is written.

The contract cannot be rescinded, or a re-conveyance directed, even by the consent of the defendants. The wife of the complainant joined in the conveyance, and the contract of the grantees is for her maintenance as well as that of her husband. Her rights are to be protected. She is not a party to the suit. She does not ask, and the evidence warrants the belief that she does not desire a dissolution of the contract. She resides upon the farm with her son, and is supported by her own labor and the assistance of her children. The husband and wife do not live together. The complainant contributes nothing to her support. His interest in the land has been sold, and to order a re-conveyance might strip both parties of their means of support, and must of necessity be prejudicial to the rights and interest of the wife. This consideration is decisive against rescinding the contract for her support, and ordering a re-conveyance of the land.

There must be a decree for a specific performance. Courts of equity may, in the exercise of a sound discretion, refuse to decree the specific performance of a hard bargain.

But this is not a case for the application of the doctrine, nor for the exercise of such discretion. The father conveyed his entire estate to his children, upon their stipulating to provide for their parents a comfortable support and maintenance suited to their condition, wherever they or either of them might choose to reside. It is no answer to a prayer for a specific performance that the property conveyed is of little value and totally inadequate to the support of the

parents in the city of New York, or elsewhere than in the country. That was a proper subject for consideration by the parties when the contract was entered into. But having been made voluntarily and in good faith, the parents are entitled to their support at the hands of the grantees so long as the avails of the property conveyed or the means of the children will suffice for that purpose.

There must be a decree for a specific performance and a reference to a master to ascertain and report what would be a suitable provision, weekly or otherwise, for the comfortable support and maintenance of the complainant, and also of his wife, according to the terms and provisions of the contract.

ULLSPERGER v. MEYER.

(Supreme Court of Illinois, 1905, 217 Ill. 262, 75 N. E. 482.)

RICKS, J. . . . It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is, that the contract is signed by appellee only. It is found in option contracts, and unilateral contracts generally, that the rule here contended for has no application; that the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor and an offer to perform, renders the contract mutual and binding.

But it is said that in the particular contract before us there was no future act or option contemplated, and that the contract had all its validity at the time it was originally made, and that to entitle specific performance of such contract there must be mutuality of obligation and remedy. It is difficult to understand upon what substantial ground the difference in the rule applicable to the two sets of contracts contended for, if it exists, is based. We are unable to understand why the mere written option signed by the vendor shall bind him by the verbal acceptance of the vendee and his offer to perform be held to be a mutual and binding contract within the Statute of Frauds, and the contract of sale acknowledging the receipt of part payment, signed by the vendor, shall be held void for want of mutuality upon the alleged ground that the vendee has not bound himself to perform by some writing. We are aware that there is a diversity of opinion and a

contrariety of holdings by the courts of last resort in the various States upon this subject, but a careful review of the authorities leads us to conclude that a contract otherwise clear and explicit is sufficient to meet the requirements of the Statute of Frauds if signed by the vendor. In the second edition of the American and English Encyclopedia of Law (vol. 29,) the subject under consideration is extensively discussed and the authorities touching it reviewed, and the conclusion there announced is (p. 258): "The weight of authority is, that the statute is satisfied if the memorandum be signed by the parties sought to be charged, alone,—or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee. In the case of a contract for the sale of lands the vendor is usually the person to be charged, and a memorandum signed by him alone is valid. The party not signing the memorandum is not bound unless, as held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, at the act of filing a bill for specific performance binds the plaintiff and renders the contract mutual." . . .

The case of *Forthman v. Deters*, 206 Ill. 159, is a very late case and on all-fours with the case at bar, and in which the question now before us was fully considered, and the conclusion there reached and announced is, that where a party accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and is bound by them, and that where the contract purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality and makes the contract binding on both parties. We deem that case conclusive of the case at bar.

We regard the rule as too well established to be open, that appellee, who is the vendor having signed the writing herein above set forth, cannot defeat performance upon the ground of want of mutuality, based upon the fact, alone, that appellant, the vendee, did not sign the same. The appellant had paid part of the consideration and had offered to pay the whole of it within a few days of the making of the contract, and unless appellee, by her answer, shall show that to enforce the same would be inequitable for some reason other than the mere want of the signature of appellant to the contract, we are of the opinion that she should be required to perform. . . .

THURBER v. MEVES.

(Supreme Court of California, 1897, 119 Cal., 35, 50 Pac. 1063.)

VAN FLEET, J. January 1, 1883, plaintiff made a contract in writing with Otto Meves, under which Meves entered into the immediate possession of a tract of about forty acres of land belonging to plaintiff, the whole of which available for the purpose Meves was to clear up and cultivate to such fruit trees, grape vines and small fruit plants as should be furnished for the purpose by plaintiff—a certain acreage to be cleared and set out each year during the period of four years; and under which contract Meves was to erect certain fences and open up a certain private way or road, in consideration of which services plaintiff was to convey to Meves on January 1, 1888, the title to the north half of said premises.

On March 10, 1884, Meves borrowed of plaintiff one hundred and fifty dollars, for which he gave his promissory note payable two years from date, with interest at one per cent per month, payable quarterly, and to secure payment of which he gave plaintiff a writing which referred to the first mentioned contract, and provided that said contract should be held as security for payment of the note, and making the right to the conveyance therein provided for, "dependent upon the payment thereof at the time and in the manner mentioned in said promissory note, in addition to the other conditions precedent to said conveyance."

August 14, 1889, Meves died, and March 10, 1890, plaintiff brought this action against defendants, the heirs of Meves, to quiet title to the north half of the land described in said first mentioned contract, then held and occupied by defendants, and to acquire possession thereof.

In a cross-complaint the defendants set up the contracts between their ancestor and plaintiff above referred to, alleged a compliance with the terms of the first, except to a partial extent wherein compliance was prevented by certain acts of plaintiff, a tender of payment of said note and willingness and readiness to pay any amount found due thereon, and prayed that plaintiff be decreed to convey to them the portion of land stipulated in said contract. The court below found the facts in all material respects as alleged in the cross-complaint, except as to the alleged tender of payment of the note, and made a

decree wherein plaintiff is required to convey the land to defendants upon payment by the latter, within sixty days, of the amount of said note and accrued interest.

Plaintiff appeals from the judgment and from an order denying him a new trial.

1. It is first contended that inasmuch as the principal contract counted on by defendants was entered into by plaintiff solely in consideration of the personal services of Meves to be thereafter rendered, which services could not have been compelled by plaintiff, there was presented at the time the contract was entered into such a lack of mutuality as to take the contract out of the class which is susceptible of specific performance by either party. While it is a general and well-established rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction. Thus in the case of *Hall v. Center*, 40 Cal. 63, 67, speaking of this requirement, it is said by our predecessors: "The rule is one which is frequently adverted to, is well understood, and the reasons upon which it is rested are familiar. But the exceptions to its operation are numerous. Lord Redesdale, in *Lawrenson v. Butler*, 1 Shoales & L. 13, limits its application to a case 'where nothing has been done in pursuance of the agreement,' by which it is to be understood that though an agreement may, at the time it was entered into, lack the element of mutuality, and for that reason may not be then such an agreement as equity would enforce, yet if the party seeking relief has subsequently, with the knowledge and the express or tacit consent of the other, placed himself in such a position that it would be a fraud for that other to refuse to perform, equity will relieve."

The principles there announced are sustained in the later cases of *Ballard v. Carr*, 48 Cal. 74, and *Howard v. Throckmorton*, 48 Cal. 489. And, adverting to this element of mutuality and the question as to the time when it must exist, it is said by Mr. Waterman: "The rule as to the time is to be taken with this qualification, that notwithstanding the contract when it is entered into be incapable of specific performance by one of the parties, or, being enforced against him, yet if the obligation to perform be mutual and the obstacle to performance be subsequently overcome, a decree may then be rendered. If the

plaintiff has performed his part of the agreement, specific performance may be decreed, although the contract, so far as concerned performance by the plaintiff, was originally beyond the jurisdiction of the court;" *Waterman on Specific Performance*, sec. 199. The authorities cited by appellant are not at variance with this qualification of the rule.

And while an obligation to perform personal services is one of which specific enforcement may not be had (*Civ. Code*, sec 3390), this rule has not the effect to defeat the right to have the specific benefit of an enforceable obligation entered into in consideration of personal services, where such services have been fully or substantially performed. (*Ballard v. Carr*, *supra*; *Howard v. Throckmorton*, *supra*; *King v. Gildersleeve*, 79 Cal. 504, 510.) In *Howard v. Throckmorton*, *supra*, which like *Ballard v. Carr*, *supra*, was an action to enforce an obligation to convey land in consideration of personal services as an attorney, it is said: "While it is true as a general proposition that a party who has contracted to perform services of the character mentioned in the contract in this case cannot maintain an action for specific performance while the contract remains unperformed on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money." . . .

WATTS v. KELLAR.

(United States Circuit Court of Appeals, 1893, 56 Fed. 1.)

CALDWELL, D. J. . . . By the terms of this contract the defendants, in consideration that the plaintiff would pay \$7,000 for the lot, agreed to pay the plaintiff \$7,700, therefor at the expiration of one year from the date of plaintiff's purchase, if the plaintiff should then elect to sell the lot at that price. The consideration for this agreement is expressed in the contract, and is sufficient. An option to sell land is as valid as an option to buy. When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such

contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them. A suit for that purpose is, of course, subject to the general rule that the specific performance of contracts for the purchase or sale of land is not a matter of course, but rests in the discretion of the court, in view of all the circumstances. But the rules by which the court will be guided, in a suit like this, in decreeing or refusing a specific enforcement are the same that they are in other suits for the specific enforcement of contracts relating to land. Cases may be found which hold that such contracts will not be specifically enforced, because the right to a specific enforcement is not mutual. The want of mutuality of right to a specific performance of a contract, which sometimes precludes its enforcement in equity, has no application to an option contract of the character we are considering. The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells. In the absence of an agreement to the contrary, each party to a contract to buy or sell land may have its specifically enforced against the other (*Raymond v. Land & Water Co.*, 4 C. C. A. 89, 10 U. S. App. 601, 53 Fed. Rep. 883); but the very purpose of an optional contract of this nature is to extinguish this mutuality of right, and vest in one of the parties the privilege of determining whether the contract shall be vitalized and enforced. An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damage as of any value. The modern, and we think the sound, doctrine is that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the maker an obligation to perform them specifically, which equity will enforce. Pom. Cont. § 167-169, and notes; *Willard v. Tayloe*, 8 Wall. 557; *Brown v. Slee*, 103 U. S. 828. In the case last cited, the supreme court of the United States enforced, quite as a matter of course, the specific performance of a seller's option which was in these terms:

"It is further understood and agreed that, if said executors desire it, said Brown shall, at the expiration of five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at \$25,000. . . ."

The opinion of the court was delivered by Chief Justice Waite, and discussed at length the sufficiency of the executors' notice of their election to sell, and the question whether the tender of the deed was timely; but contains no intimation that the want of mutuality in the contract was any impediment to its specific enforcement. The want of mutuality was too obvious to be overlooked, and the fact that it was not adverted to shows that, in the judgment of that court, the right to enforce the specific performance of such a contract was too well settled to require or justify any observation. Viewed in any light, the bill presented a case of equitable cognizance, and it was error to dismiss it. . . .

DRESSEL v. JORDAN.

(Supreme Court of Massachusetts, 1870, 104 Mass. 407.)

WELLS, J. . . . This consideration leads to another objection urged by the defendant, namely, that there is a want of such mutuality as is requisite for an agreement entitled to specific enforcement. So far as this objection rests upon the ground that there was no legal and sufficient agreement on the part of the sellers, for any of the reasons already considered, no further discussion is necessary. Beyond that, the point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfill the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able, in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance. . . .

The equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by the offer to fulfill by the other party, and request for a conveyance, the seller will be allowed 'reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration. . . .

In the present case, although a fixed time was named in the contract for conveyance of the title, the defendant was himself at no time ready to receive it until after the plaintiffs had, by the sale to Cram, enabled themselves, by means of a quitclaim deed from Cram, to transfer the whole title. The plaintiffs were not therefore at any time in default, in respect to the title to this third part of the estate. . . .

LOGAN AND WIFE v. BULL.

(Kentucky Court of Appeals, 1880, 78 Ky. 607.)

PRYOR, J. This action was instituted in the Louisville chancery court on the 1st of December, 1873, by the appellants, Logan and wife, against John Bull, for the specific execution of a contract evidencing the sale of a lot of ground and the improvements on the northeast corner of Fifth and Market streets, in the city of Louisville. . . .

It is further contended by the appellees that a specific execution of the contract should be denied because the title to a part of the lot is in the *feme covert*, and as the chancellor has no power to compel *her to convey*, there is such a want of mutuality in the obligation as to render the contract invalid.

The general doctrine is, that a contract incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. (Fry on Specific Performance, page 198.)

It has often been held under this rule, that a party at the time he makes his contract, although not invested with such a title as he

undertakes to convey, may compel a specific execution where time is not of the essence of the contract. Cases may be found, and language used by some of the elementary writers on the subject, conducing to the conclusion that, in the absence of such a title in the party at the time of making the contract as he contracts to convey, the vendee may rescind, and a specific execution will be denied; but the equitable rule as now settled by nearly all the authorities on the subject is, that when the contract is required to be performed, if the party is able to convey, and tenders his deed, the contract will be enforced, although his title was defective at the date of the contract; and if not able to convey at the time of filing a bill of rescission, if time is not of the essence of the contract, the chancellor will permit the vendor, if he can do so within a reasonable time, to supply the defects in his title, so as to comply with his contract. (*Dressel v. Jordan*, 104 Massachusetts.)

In this case the husband and wife, living at the time in the state of Missouri, authorized their agents in Louisville, by telegraph and by letter, to make the sale to the ancestor of the appellees on the terms mentioned in the writing. The obligation to perform the contract was as binding on Logan as on Bull, and the fact that the title to a part of the lot was in the wife, who could not be compelled to convey, is immaterial. If in a reasonable time Logan was ready to make good the title, and particularly when he has not failed to make a title on the demand of the vendee, the purchaser should be compelled to accept it. The ancestor of the appellees knew when he made this purchase that the title to a part of the lot was in the wife, and that the chancellor could not coerce a conveyance, and whether he possessed this knowledge or not, the obligation on the husband to convey was as binding on him as the obligation on the vendee to pay the money.

The ancient practice in equity was to decree the husband to perform his contract in such a case where, as Lord Eldon says, it was usually impossible for him to perform. The modern rule on the subject is to adjudge a specific performance, although the title may have been in the wife when the contract was made with the husband, if the latter is ready to comply by tendering such a conveyance as will pass the title. If the wife consents to convey, and does convey, the vendee has no right to complain. . . .

CHAPTER III. SPECIFIC REPARATION AND PREVENTION OF TORTS.

SECTION I. WASTE.

OHIO OIL CO. v. DAUGHETEE.

(Supreme Court of Illinois, 1909, 240 Ill. 361, 88 N. E. 818.)

DUNN, J. The appellee N. P. Daughetee is the owner in fee of 190 acres of land in Clark county. His sister, Sydney A. Stephenson, died in 1895, owning 60 acres adjoining it on the south, which by her will she devised as follows:

"I give and devise and bequeath to Nathaniel P. Daughetee, trustee, in trust, and to his successors forever, all my estate, real, personal and mixed, of whatever kind or nature soever, of which I may die seized or possessed, to have and to hold, manage, rent, lease and control, in trust, for the uses and purposes following: To pay the expenses of such trust and for necessary repairs and taxes, and to pay over the annual proceeds therefrom to my nephew, Rhinehart C. Daughetee, for and during the natural life of him, the said Rhinehart C. Daughetee, with remainder over to the heirs of the body of said Rhinehart C. Daughetee upon his death, provided he die leaving a child or children or descendants of child or children, equally, share and share alike, to them and their heirs forever. In the event of the death of said Rhinehart C. Daughetee without issue of his body then surviving, then and in that event I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, to my brother, Nathaniel P. Daughetee, and his heirs forever."

On June 3, 1904, N. P. Daughetee entered into a written contract with a co-partnership doing business under the name of Hoblitzell
1 Eq.—15.

& Co., whereby he granted to them all the oil and gas in and under both his own 190 acres and the 60 acres held by him in trust, together with the right to enter thereon at all times for the purpose of drilling and operating for gas and oil, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil and gas, with a right of way over and across said premises to the place of operation, and the exclusive right to remove any machinery or fixtures placed on said premises, doing the least possible damage to said premises, and with the right reserved to the grantor to use the premises for tillage and for all other purposes not inconsistent with the object of the lease. The contract was for the term of five years and as much longer as gas or oil was found in paying quantities. . . .

N. P. Daughetee had possession and control of the 60 acres under his sister's will as trustee. He had no present beneficial interest in the land. His only authority to contract in regard to its possession or use was derived from the will, which gave him the right to manage, rent, lease and control the land, but no authority to sell or mortgage it or any part of it. The power of control and management given him was, during Rhinehart C. Daughetee's lifetime, for the purpose of making necessary repairs, paying taxes and expenses and paying the net annual proceeds to him. The only management and control contemplated was that which had to do with the annual proceeds of the land. The authority of the trustee was to grant ordinary farming leases in accordance with the ordinary terms of the neighborhood, but not unusual leases or leases of unopened mines. 2 Perry on Trusts, sec. 528; Clegg v. Royland, L. R. 2 Eq. 160.

Granting that the trustee held the title in fee, he held it for the benefit of the remainder-man as well as the life tenant, and had no right to waste the estate for the benefit of the life tenant at the expense of the remainder-man. It is a well established rule of law that the opening of new mines upon land by a life tenant amounts to waste. (Priddy v. Griffith, 150 Ill. 560.) The same rule applies to oil wells. Oil is a mineral and part of the realty. Owing to its fugitive nature, a grant of oil under the ground is a grant, not of the oil in place in the earth, but of such oil as the grantee may find there and save. The right to go upon the land and remove all the oil, if of unlimited duration, is a freehold estate, (Watford Oil and

Gas Co. v. Shipman, 233 Ill. 9; Bruner v. Hicks, 230 id. 536;) and a grant of such right is, therefore, in legal effect, a sale of a portion of the land. Blakely v. Marshall, 174 Pa. 425; Stoughton's Appeal, 88 Pa. 198.

There were no oil wells on the land at the time of the testatrix's death. A tenant for life, under such circumstances, would have had no right to operate for oil on the land. (Marshall v. Mellow, 179 Pa. 371.) Neither could the trustee operate for his benefit. The taking out of the oil would be waste, which a court of equity will enjoin. Williamson v. Jones, 43 W. Va. 562.

Counsel for appellant insist that the remainder to Homer Daughettee is contingent; that he has no estate in the land but a mere expectancy, which will not enable him to maintain the suit. On the other hand, it is contended in behalf of appellees that the remainder is vested and the court so found. It is not essential to a decision of the case to determine whether the interest of Homer Daughettee is vested or contingent. A contingent remainder-man has no certain estate in the land, and therefore no standing to maintain an action at law for past waste or a bill for an account therefor; but, though his claim depends upon a contingent event, he may maintain a bill against a life tenant to enjoin future waste, because otherwise no remedy exists for the protection of the interest in remainder but the life tenant without a semblance of right may despoil the inheritance with impunity. The bill, in such case, may be maintained for the protection of the inheritance, which is certain though the person on whom it may fall is uncertain. (Brashear v. Macey, 3 J. J. Marsh. 93; Cannon v. Berry, 59 Miss. 289; Coward v. Myers, 99 N. C. 198; Lewisburg University v. Tucker, 31 W. Va. 621.) The acts which the crossbill seeks to enjoin and which the appellant claims the right to commit, clearly amount to waste against the remainder-man. The trustee could not authorize them. The case is different from those of Fifer v. Allen, 228 Ill. 507, and Gannon v. Peterson, 193 id. 372. The defendants sought to be enjoined in those cases were owners of the fee, determinable, it is true, but still having all the rights of tenants in fee simple until the determination of their estates. The acts sought to be enjoined were such as they might rightfully do as owners of the fee. The interests sought to be protected were mere expectancies, which might never have any existence. Here the interest

sought to be protected is certain to accrue and the acts sought to be enjoined are without color of right of any kind. This case is within the requirements suggested in the cases just mentioned, the contingency being certain to happen and the waste threatened amounting to a wanton and unconscientious abuse of right. . . .

TAYLOR v. ADAMS.

(Missouri Court of Appeals, 1902, 93 Mo. App. 277.)

ELLISON, J. This action is for waste alleged to have been committed by defendant on the lands described in plaintiffs' petition. At the close of plaintiff's case the trial court sustained a demurrer to the evidence. The question involved arises out of the following deed:

This deed conveyed an estate for life to Elenora Taylor, for though she had also the power of appointment over the remainder, that did not enlarge the estate especially limited. *Evans v. Folks*, 135 Mo. 397. Elenora is alive, and at the time of the trial was fifty years old. Her life estate was sold at sheriff's sale and defendant became the purchaser. He thereby became tenant for the life of Elenora, and as such he is charged by plaintiffs, who are Elenora's children, with waste of the estate, and damages are asked. The plaintiffs base their claim of right to sue on the idea that they are owners of the estate in remainder. Their right to sue depends on whether their estate in remainder is vested or contingent. If contingent, they have no standing in law for in such event it can not be known in advance of the happening of the contingency, that they have been damaged by the waste. If they should recover damages, and then the contingency upon which their estate depends not happen, they would be paid for what they had not lost. And so the law is that a contingent remainderman has no action for waste (*Sager v. Galloway*, 113 Pa. St. 500; *Hunt v. Hall*, 37 Maine 363), though in equity they could perhaps have injunction to prevent future waste (*Cannon v. Barry*, 59 Miss. 289, 302; *University v. Tucker*, 31 West Va. 621.) The distinction of the contingent remainderman's right at law in damages and in equity to an injunction has good reason in its support. For while

he will not be allowed to recover damages for that which may not be his, he should be allowed to prevent the destruction of that which may become his.

MORRIS v. MORRIS.

(In Chancery, 1853, 3 De G. & J. 323.)

This was an appeal by the plaintiffs from an order of Vice-Chancellor Stuart dismissing the bill which was filed to obtain, among other things, compensation out of the estate of a deceased tenant for life for equitable waste in pulling down a mansion-house called Clasemont, in Glamorganshire.

In June 1819, Sir John Morris, the father, settled the barony of Sketty, in Glamorganshire, and other estates, on himself for life, with remainder to the use of trustees for 1,000 years, upon trusts for raising money to pay off certain charges, and subject thereto to the use of trustees during the life of Sir John Morris the son, without impeachment of waste (provided the same should be committed or suffered with the privity or assent of Sir J. Morris, the son), upon trust to preserve contingent remainders, and to permit Sir J. Morris, the son, to receive the rents during his life, with remainder to the use of Sir J. Armine Morris, for life, without impeachment of waste, with remainder to the use of the first and other sons of Sir J. A. Morris, successively in tail male, with ultimate reversion to the settlor in fee.

The settlor died soon after the date of the settlement, and Sir J. Morris, the son, entered into possession. At this time there was upon the settled estates the mansion-house of Clasemont. This house had, for various reasons, become undesirable as a residence, and the settlor had, for some years before his death, shut it up, and had made some preparations for building another at Sketty, upon part of the settled estates. In 1820, at which time Sir J. A. Morris, the grandson of the settlor, was about nine years old, Sir J. Morris, the son, pulled down the mansion at Clasemont, and soon afterwards completed the new one at Sketty, which was much superior to the old one. It was proved in the cause, as satisfactorily as such a fact

could be expected to be proved at such a distance of time, that the bulk of the materials of the old house had been employed in erecting the new one, and there was no evidence to show that any part of them had been sold.

In 1847, Sir J. A. Morris obtained an injunction to restrain Sir J. Morris, the son, from cutting down ornamental timber in the grounds at Clasemont, and the order granting this injunction was affirmed by Lord Cottenham.

Sir J. Morris, the son, died in 1855, leaving a will, by which he appointed his widow, Lady Morris, his executrix.

The present bill was filed by Sir J. A. Morris and his eldest son against Lady Morris, asking, among other things, that it might be declared that the pulling down the mansion-house at Clasemont was an act of equitable waste, and that an account might be taken of the application of the materials, and of the profits received by Sir John Morris, the son, from them, and that the amount of compensation to which the plaintiffs might be entitled in respect of such waste might be paid into Court.

Vice Chancery Stuart dismissed the bill without costs, and the plaintiffs appealed. The bill also raised another question, but as the defendant, upon the hearing of the appeal, did not resist a decree upon that part of the case, and no argument took place upon the point, it is not thought necessary to notice it further. . . .

THE LORD JUSTICE KNIGHT BRUCE. This is not a question of injunction, for the act of which complaint is made was done more than thirty years ago. It is a mere question of equitable debt, in considering which we must look to the particular circumstances of the case. That it was a reasonable, a judicious, and a beneficial thing to pull down the house at Clasemont, and to use the materials, so far as they could be used, for building the mansion at Sketty, is perfectly clear; but I agree with Mr. Malins, that an act may be reasonable, may be judicious, may be beneficial to all the persons interested in a settled property, and yet it may be an act prohibited to a tenant for life, if a person interested in remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness, and on the beneficial nature of what was done, but they are ingredients in it. The estate has been benefited by what has been done, and the plaintiffs are receiving that benefit. Still, if it had been shown, or were in any degree likely, that any part of the materials

of the house had been sold, probably, notwithstanding the much larger expenditure on the construction of the new mansion-house, the assets of the second baronet would have been held liable to account. Here however, there is no evidence that any part of the materials was sold, and the probability is, that no part or no substantial part of them was sold. There is evidence that most of the materials, probably all the materials that were of any value, were applied in building the present mansion-house in a proper position upon the estate. In my judgment it would be unjust, and would be stretching a rule beyond its reason, to make the tenant for life account for the materials of a mansion-house on the estate, wisely pulled down, when the materials have been so applied in rebuilding. I am of opinion, therefore, that in the circumstances of the present case, there is no ground for directing an account of equitable waste, and the bill ought to remain dismissed, as far as it relates to the materials of the Clasemont house. . . .

KING v. SMITH.

(In Chancery, 1843, 2 Hare 239.)

VICE-CHANCELLOR. The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be £1,000, and the property to be worth £1,000 that is, in one sense, a sufficient security; but no mortgagee, who is well advised, would lend his money, unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would probably require more. It is rather a question of prudence than of actual value. I think the question which must be tried is whether the property the mortgagee takes as a security, is sufficient in this sense,—that the security is worth so

much more than the money advanced,—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question, whether the court should permit the mortgagor to cut the timber. The supplemental bill, which states the circumstances with respect to the timber, and prays the injunction, contains no case with reference to the insufficiency of value, nor does the plaintiff, by his affidavit, make any such case. The bill and affidavit appear to proceed on the supposition that the mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shown, I am not told the quantity of the land, or the rental; nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the Defendant's affidavits, that he did not cut any of the trees with intention of injuring the estate but on the contrary, he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious, that the Defendant is using language, of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

Let the motion stand over, with liberty to apply. If the Defendant proceeds to cut more timber, the Plaintiff can renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.

MURRAY v. HAVERTY.

(Supreme Court of Illinois, 1873, 70 Ill. 318.)

SCOTT, J. It is not controverted defendants dug and removed large quantities of coal from the premises described in the declaration,

and hence the principal question is, whether they can justify under the license offered in evidence.

The land upon which the alleged trespasses were committed was owned, at the time, by tenants in common. It was subsequently divided, and the east half set off to plaintiffs, for whose use this suit was brought. Prior to the entry of defendants upon the premises, they had entered into an agreement with Peter Howard, who was a tenant in common with plaintiffs' by which they obtained the privilege to enter and construct a drain across the premises, but below the vein of coal. It was to be for their own benefit, and for the privilege secured they were to pay \$200.

The construction of the drain would necessarily require the excavation and removal of large quantities of coal, for which they agreed to pay at the rate of two cents per bushel.

It is insisted, this license is a bar to an action of trespass for anything done by defendants in the execution of the contract. . . .

Counsel, however, maintain that defendants can defend against the alleged trespasses, under a license obtained from one of the tenants in common. Waiving any technical objection that might be urged against the form of the plea, under this view of the law, we do not think the proposition assumed can be sustained, either upon reason or authority.

The common law doctrine is, tenants in common are seized of each and every part of the estate, but it is not in the power of one to convey the whole of the estate, or the whole of a distinct portion, or give a valid release for injuries done thereto. It has most generally been ruled that, as against the other co-tenants, such a deed is inoperative and void. *Marshall v. Trumbull*, 28 Conn. 183; *Hutchinson v. Chorr*, 39 Maine, 513; 4 Kent's Com. 368.

No principle is better settled, than that one tenant in common can not lawfully commit waste or destroy the common property, or do any act that will work a permanent injury to the inheritance. Our statute has authorized one tenant to maintain trespass or trover against his co-tenant, who shall take away, destroy, lessen in value or otherwise injure the common property. Mining coal or excavating and removing earth, would tend to injure, destroy and lessen in value the estate. Notwithstanding the fact, in contemplation of law, tenants in common are all seized of each and every part of the estate, still, neither

one is permitted with impunity to do acts deemed prejudicial or destructive of the interests of the other co-tenants. If a tenant in common can not himself lawfully dig and remove the soil or coal or other valuable material beneath the surface, that would tend permanently to lessen the value of the estate, how can he grant that right to a stranger? Upon principle, the licensee can take no better title or higher authority than the licensor himself possessed. The law would not permit Peter Howard to enter upon the common property and remove from thence the coal deposits, which must constitute the real value of the estate. Hence it follows, his warrant or license to a stranger would afford no answer to an action of trespass brought by his co-tenant. . . .

LIPPINCOTT v. BARTON.

(New Jersey Court of Chancery, 1886, 42 N. J. Eq. 272, 10 Atl. 884.)

BIRD, V. C. This bill is filed by the executor of Ann H. Pancoast, deceased, to recover the value of trees cut by her husband David C. Pancoast, who continued in possession as tenant by the curtesy of her lands after her death. The defendant against whom the suit is instituted, are the executors of the tenant for life. It is claimed that this suit may be maintained in this court for the waste committed, on the ground of equitable conversion, and upon the ground of injustice to Clement G. Lippincott, one of the grandsons of David C. Pancoast, by whose will he has but \$100 bequeathed him, while by the will of Ann H. Pancoast he has an equal interest with the other legatees.

Neither of these alleged grounds brings the case within the jurisdiction of this court. I have examined a number of authorities, and none of them goes so far as to sustain the complainant's insistent.

In *Ware v. Ware*, 2 Hal. Ch. 117, the doctrine, which is expressed in all the other authorities, is that an account for waste done is only incidental to relief by injunction against further waste. 1 Lead. Cas. in Eq. 1024; *Jesus College v. Bloome*, 3 Atk. 262; *Winship v. Pitts*, 3 Paige 259; *Story's Eq.* §§ 616, 518.

From these and other cases it appears that this court only has jurisdiction to compel an account as incidental to the right of an injunction

to stay the commission of further waste, and that only in order to prevent a multiplicity of suits. *Grierson v. Eyre*, 9 Ves. 341, 346; *Watson v. Hunter*, 5 Johns. Ch. 169; 1 Addison on Torts 319.

Nor can I conceive of any principle upon which this complainant can stand in this court for the recovery of these moneys. If he is entitled to them he can recover them by an action at law for money had and received, or for the trespass in cutting, or trover in converting. Rev. p. 396, § 5.

LANSDOWNE v. LANSDOWNE.

(In Chancery, 1815, 1 Maddock, 116.)

THE VICE-CHANCELLOR (SIR THOMAS PLUMER). Upon this demurrer two points are to be considered: 1st. How the case stood as to the deceased marquis? 2ndly. How the case stands as to his representatives? The late marquis was tenant for life, without impeachment of waste and as such had a right at law to cut timber on the estate, and had a property in the trees, but having abused that power by cutting ornamental trees, and trees not ripe for cutting a Court of Equity says he shall not do these things with impunity, but interposes to restrain the legal right; and equity not only restrains him from doing further waste, but directs an account of the waste done, and will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate. . . .

What is said in *Jesus Coll.* and *Bloom*, as to not entertaining a bill after the estate of the tenant for life is determined, applies only to cases where legal waste has been committed and where the party is liable at law in respect of the waste committed; but here it was equitable waste, as to which a Court of law gives no remedy. Lord Hardwicke, in that case, says, "The party ought to be sent to law;" which shews he was alluding to legal waste. The party had for such waste a remedy under the statute of Marlbridge, (52 Henry 3, c. 23), or might have brought an action of trover, but the Court never sends a party to law in cases of equitable waste, they being exclusively of equitable cognizance. As against the late marquis, therefore, a bill might have been

filed though no injunction were prayed. This Court will not permit a man to commit equitable waste, and retain the produce of the injury, which is recoverable in no other Court. Relief is given for the benefit of those who come after. The case, therefore, of *Jesus College and Bloom* is distinguishable from the present. In *Garth and Cotton*, Lord Hardwicke, alluding to his decision in that case, says: "It affords no conclusive argument that a bill for an account of waste cannot be maintained without praying an injunction." (1 Dick. 211). The marquis died, after having sold and converted to his use the money produced by his wrongful act; and upon general principles, independent of decision, the assets ought to be liable to pay in respect of his conduct, such assets having been augmented by it. . . .

It has been argued that, as when legal waste is committed, and there are no persons in being, or appearing, who could authorize it, or bring an action in respect of the waste, the wrong is without remedy; so here, there being no person *in esse*, or appearing, when the waste was committed, who could authorize it, a bill will not lie in respect of such waste; but it signifies not whether such person were *in esse* or not, for waste of this description could not be authorized—such destruction cannot be authorized—the Court says it shall not be done. The produce of the waste is laid up for the benefit of the contingent remainder men. (*Williams v. Duke of Bolton*, mentioned in Mr. Cox's note to *Bewick v. Whitfield*, 3 P. Wms. 268.) To adopt such an analogy to the law, in a case where relief is given against the law, would be singular.

Upon these grounds I think the supplemental bill for an account by the new trustees, the tenant for life, and tenant of the inheritance was properly brought. The trustees were the proper persons to file the bill against the late marquis, and the present plaintiffs were the proper persons to file the supplemental bill, though one of the plaintiffs was not *in esse* when the first bill was filed, inasmuch as the money produced by the waste is not to be pocketed, but to be laid up for the benefit of those who in succession will take the estate. . . .

SECTION II TRESPASS.

KING v. STUART.

(United States Circuit Court, 1897, 84 Fed. 546.)

PAUL, D. J. This is a suit brought by the plaintiff, Henry C King, to restrain the defendants from cutting and carrying away the timber of the plaintiff on certain lands claimed by him, lying in Buchanan county, Va., the same being part of a tract of 500,000 acres lying in the states of Virginia, West Virginia, and Kentucky. . . .

The first ground of demurrer, viz. "that the plaintiff has a full, complete, and adequate remedy at law, and is, therefore, not entitled to relief in equity for the matters complained of in said bill," presents a clearly defined and important question for decision. A demurrer to a bill in equity admits the truth of the allegations of fact in the bill so far as the same are well pleaded. 1 Fost. Fed. Prac. § 108. The defendants in this cause, by their demurrer, admit the complainant has title to the land mentioned in the bill lying within this district, and that he is in possession of the same. They likewise admit that the defendants have no title to said land; that they are not in possession thereof. They admit that the land is wild and uncultivated; that it is heavily timbered with a valuable growth of poplar, oak, walnut, and other valuable trees, and is practically worthless for agricultural purposes; that it was purchased by the complainant solely on account of the timber; that they have, against the protest of the plaintiff, entered upon said land, and have cut down, and are preparing and threatening to remove a large quantity of valuable walnut and other timber; that they enjoy ready facilities for removing the same out of the state of Virginia into the states of Kentucky and West Virginia. They further admit the facts upon which it is alleged that these trespasses if permitted to continue, will result in permanent and irreparable injury and damage to the land and to the plaintiff. Admitting these facts, the defendants insist that a

court of equity cannot, by injunction, prevent an actual or threatened trespass going to the destruction of the growing timber, and thereby causing irreparable damage to the plaintiff. It has frequently been held by this court, and by the circuit court of appeals for this circuit that pending an action at law to try the title to land, an injunction will lie to prevent the cutting and removal of timber until the question of the title has been determined at law; that the interests of the parties should remain in statu quo pending the litigation of the title. The defendants in this cause insist that, as there is no action pending at law involving the title to the land, an injunction will not lie to prevent the destruction of timber, which the plaintiff alleges will result in irreparable injury to him. The contention of the defendants is that the plaintiff has a full, adequate, and complete remedy at law for any damage he may suffer by reason of the trespasses of which he complains; that this remedy is an action at law for damages, to be measured by the value of the timber removed. That this was the doctrine at common law is admitted, but that its strictness has been greatly modified by the decisions of courts of equity in England and in this country is too well established to admit of discussion. A leading case in this country on this subject is that of *Jerome v. Ross*, 7 Johns. Ch. 315. In this case Chancellor Kent, while closely adhering to the common-law doctrine, said:

"In ordinary cases, this latter remedy (an action at law) has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless."

He further says:

"I do not know a case in which an injunction has been granted to restrain a trespasser merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass."

As cautiously and carefully as Chancellor Kent states the law, it seems that his view of the doctrine would cover the case at bar, and entitle the plaintiff to an injunction. But the law of injunction against trespass has, since the decision in *Jerome v. Ross*, been relaxed and expanded until now it is held that an injunction will lie to restrain

trespass whenever the injury done or threatened would result in irreparable injury, or the defendant is insolvent. It will also be granted where the entire wrong cannot be redressed by one action at law for damages; this on the principle that equity will interpose by injunction to prevent a multiplicity of suits. . . .

The contention of counsel for the defendants that an injunction to prevent the destruction of trees is confined to trespasses which destroy groves kept for beautifying the owner's home or lands, or to shade and ornamental trees, cannot be sustained. The modern decisions apply the relief by way of injunction to coal, iron, and other mines, and to growing timber in a forest. Applying the doctrine laid down in the authorities above quoted, I find no difficulty in deciding that the temporary injunction in this cause was properly awarded, and should be perpetuated. The trespass committed is not a single act, temporary in its nature, and such as might be compensated for by a single action for damages, but is continuous from day to day, and, if permitted to continue, will ultimately result in the entire destruction of the valuable timber admitted to belong to the plaintiff. The damage done to the plaintiff today by cutting his timber is the foundation for an action of damages. The measure of recovery, on the damages laid in the writ in an action brought for this trespass will be the injury suffered by the plaintiff to the time of bringing his suit. Tomorrow the defendant commits further injury by cutting other timber, thus giving the plaintiff another cause of action, and requiring him to bring another suit, if he is to be remitted to his remedy at law, for it is not to be presumed that the plaintiff will stand idly by until the destruction of his property is complete, and, by his acquiescence, perhaps endanger his right to recovery of damages for the injury done him. This statement shows the multiplicity of suits to which the plaintiff would have to resort for redress, and at the same time it shows the futility of the plaintiff's remedy at law,—a remedy which must be full, complete, and adequate. The remedy by an action at law for damages against a trespasser may have been an efficient remedy at common law. But at this day, when property of all kinds readily and easily changes hands; when a man who is solvent today may be insolvent tomorrow; when the ready means of transportation quickly conveys personal property from one section of the country to another, perhaps out of the jurisdiction of the courts which have

been established for the protection of property rights; and when we consider the long delays that often precede a trial, a judgment, and execution,—we see how entirely inadequate is the remedy at law to secure compensation to a person whose property is destroyed by a trespasser. So far from his remedy at law being full, complete, and adequate, he may find himself, at the end of his litigation, with a naked execution in his hands, with no means for its satisfaction. In the meantime his most valuable property interests have been destroyed.

The only remaining question for discussion is: Is the damage that will result to the plaintiff if the defendants are permitted to cut and carry away his valuable timber irreparable? It must be conceded that every man has a right to enjoy his own property in his own way; that he has a right to say how long he will keep it, and when and how he will dispose of it. In the case of a heavily-timbered tract of land, like that of the plaintiff, it is his right to say what part of it, if any, or what particular trees or kinds of trees, he will cut, and what he will leave standing. It is difficult to find any kind of property that will suffer more by unrestrained trespasses, or that is more difficult to be compensated for in damages after its destruction than a forest of growing timber such as the plaintiff's. The trees are increasing in size and value from year to year; the younger trees are constantly reaching nearer the size at which they can be profitably utilized, and are constantly rendering the estate more valuable. Coal and ore, if taken from mines, may be measured as to quantity and value. They have no increasing value by reason of growth, but are of fixed quantity. Yet the removal of coal and ore from mines is held to work irreparable damage to the property of the owner of the mine. The court knows of no measure of damages that could be adopted by a jury that would properly estimate what would be the value of a body of timber five years hence that is destroyed by a trespasser today. The court has no hesitancy in holding that the destruction of the plaintiff's timber by the defendant, as they threaten to do, and were doing when restrained, would result in irreparable damage to the property of the plaintiff, and that the plaintiff is entitled to the protection of a court of equity. . . .

MURPHEY v. LINCOLN.

(Supreme Court of Vermont, 1891, 63 Vt. 278, 22 Atl. 418.)

THOMPSON, J. . . . The defendants contend that this case is not within the jurisdiction of a court of equity, for the reason that the orator has an adequate remedy at law. The bill charges the committing of several continuous trespasses by defendants by drawing wood and logs from their land across the pasture and meadow land of the orator, and that the defendants threaten to continue to commit these trespasses. The defendants, in their answer, either expressly or tacitly, by their failure to deny them, admit the truth of these allegations. They also claim a right of way across the orator's land to that part of the propagation lot owned by them by the route traveled when they committed the alleged trespasses. These facts bring the case within the jurisdiction of the court of equity. The rule applicable to cases of this kind is stated in 3 Pom. Eq. Jur. §1357, as follows: "If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself may not be destructive, and the legal remedy may, therefore, be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction on the ground of avoiding a repetition of similar actions." The use of this way across the orator's land by defendants under a claim of right, if continued long enough would ripen into an easement. Equity will interfere to enjoin such wrongful acts, continued or threatened to be continued, to prevent the acquisition of an easement in such a manner. . . .

LADD v. OSBORNE.

(Supreme Court of Iowa, 1890, 79 Iowa 93, 44 N. W. 285.)

ROTHROCK, C. J. . . . It is claimed that the proof does not establish the facts that the defendant repeatedly opened the fences and traveled across the premises, and that it affirmatively appears
1 Eq.—16.

that he is not insolvent, and that there is no ground for equitable interference by injunction for what was merely an action at law for trespass. The right to an action in equity, restraining the removal of fences and opening up highways, the cutting down of shade trees, or any other threatened invasion, use or occupation of the land of another, has been too long established in this state to be now called in question. In *City of Council Bluffs v. Stewart*, 51 Iowa, 385, it was said that "Courts of equity will, under certain circumstances, interfere by injunction to prevent trespasses upon real estate; but to authorize such interference there must exist some distinct ground of equitable jurisdiction, such as the insolvency of the party sought to be enjoined, the prevention of waste or irreparable injury, or a multiplicity of suits." See, also *Bolton v. McShane*, 67 Iowa, 207, and cases there cited. In the case at bar the evidence shows that there had been for some time contention between the parties as to whether a public road existed over plaintiff's land. The defendant contended that there was a public highway, and he more than once opened the plaintiff's fences, and traveled over the land, and threatened to continue to do so. The plaintiff was not required to institute an action at law for every act of trespass, but, to avoid a multiplicity of suits, it was his right to have relief in equity by injunction, regardless of whether the defendant was solvent or insolvent. . . .

STARR v. WOODBURY GLASS WORKS.

(New Jersey Court of Chancery, 1901, 48 Atl. 911.)

Bill by Lewis Starr against the Woodbury Glass Works for an injunction to prevent the running of oil on plaintiff's premises.

Injunction advised. . . .

GREY, V. C. The complainant owns and is in possession of a piece of meadow and pasture land in Woodbury adjoining the property where the defendant has located its glass works, in which it uses large quantities of crude kerosene oil. All the affidavits show that the waste from the use of this oil was by the defendant permitted to flow over and upon the complainant's lands. That the presence of such material upon a meadow is destructively injurious, fouling the

waters, and ruining the vegetation, goes without saying, but is also proven without denial. The affidavits annexed to the bill of complaint, together with the contents of a bottle containing a sample of the water on complainant's lands, offered as an exhibit, show the condition of his premises immediately before the filing of the bill in this cause. These exhibit a foulness which is wholly impossible in nature, rendering the flowing water worse than useless for any purpose. This condition is shown by the defendant's letters of explanation and denial, and substantially by the affidavits it offers, to be attributable to the overflow of waste oil and oil water from defendant's premises over to and upon the complainant's land. The defendant's affidavits do not deny that the waste oil thus came over upon complainant's lands, nor that it fouled the waters there flowing. The defendant practically admits that it has done the injury complained of, but it declares that it has so arranged its use of the oil that since July, 1900, there has been no overflow of oil waste. It does not seem to be possible that an oil so volative and difficult to retain as kerosene could be found, just before the filing of the bill, deposited in such great quantity, when there had been no overflow for more than eight months. In such a period the previous deposit lying open to the weather and on the surface of the earth, would either have evaporated or percolated out of sight. The proof is that it is presently on complainant's of his property for which no adequate satisfaction can be given. It is a continuing injury to his property right. He cannot use his meadow for pasture, he cannot cultivate his lands, his stock cannot be watered in the ditch or stream. For such inconvenience, vexation, and deprivation no damages that could be recovered would afford any adequate satisfaction. There is the less reason to hesitate to allow an injunction in this case because there is no denial by the defendant that the waste material has flowed from the defendant's lands upon the complainant's premises, nor is there any claim of any right to maintain such an overflow. The denial is limited to the claim that the defendant has now so fixed its works and the use of the oil that the injury does not continue. This claim is not sustained, but, if it be true, the injunction cannot harm the defendant, as it will only prohibit the permittance of future foul overflows, and this the defendant contends it has already arranged; whereas, if it be false, and no writ is allowed, the admitted injury to the complainant's premises will continue. I will advise the allowance of an injunction.

CROCKER v. MANHATTAN LIFE INS. CO.

(Supreme Court of New York, 1900, 31 N. Y. Misc. 687, 66 N. Y. Supp. 84.)

LAWRENCE, J. . . . I am of the opinion, also, that the evidence establishes that from the roof of the defendant's building to the roof of the plaintiff's building, at the Broadway end, the defendant's north wall overhangs the plaintiff's true southerly line by $3\frac{1}{2}$ inches at the first cornice, at the second cornice $3\frac{3}{4}$ inches, and at the third cornice $4\frac{3}{4}$ inches; also, that the defendant's northerly wall extends over the plaintiff's southerly boundary line at the New-street end $1\frac{1}{8}$ inches, at the roof of the plaintiff's building, and that from that point the defendant's wall is plumb. Upon this state of facts, as the principal encroachment is in the air, I am of the opinion that the case which is presented is purely one for compensation, and that, as this action has been brought upon the equitable side of the court, while the plaintiff should be afforded proper compensation it would be most unjust to the defendant to order it to take down the northerly wall of its building, or such part as may be necessary to remove the encroachment. The evidence shows that to take down that wall would subject the defendant to enormous expense, without conferring upon the plaintiff any corresponding benefit. The principal encroachment is at a great height, and it is questionable, on the evidence, whether it will materially lessen the rental or fee value of the plaintiff's property. It is conceded by the defendant that the ornamental cornices and swinging iron shutters project over the plaintiff's southern boundary line. The shutters were placed there, as is claimed by the defendant, in obedience to chapter 275 of the Laws of 1892 (section 491). The defendant offers to enter into any obligation which may be required to show that it makes no claim in consequence of the location of the shutters and cornices, to have acquired a permanent right to keep them in their present location, or to obtain an easement in respect to them in the plaintiff's land. I conclude, therefore, that the proper judgment to be rendered in this case will be to enjoin the defendant from continuing the cornices and shutters in their present position whenever the plaintiff or his grantees shall require them so to do, if the plaintiff or his grantees should desire to build upon the premises known as "No. 70 Broadway." The defendant should also be required to execute an

instrument, to be approved of by the court, declaring that it makes no claim to any right to have said cornices and shutters remain permanently in their present position. The plaintiff, too, is entitled to be compensated for the damages which he has sustained by reason of the encroachment of the defendant upon his boundary line, as above stated. On the evidence before me, it is most difficult to determine what that compensation should be, but, after considering the expert testimony produced by the parties, I have reached the conclusion that \$5,000 would not be an excessive amount to be paid by the defendant to the plaintiff. The judgment will provide, however, that the plaintiff shall execute and deliver to the defendant, upon the receipt of that sum, a release for all damages which he may have sustained by reason of the encroachment. If that is declined by the plaintiff, then, as it is not always incumbent upon the court to grant an injunction where its allowance would produce vast injury to the defendant without corresponding benefit to the plaintiff, I think that I ought, in the exercise of my discretion, to refuse the plaintiff equitable relief, and remit him to his action at law. *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741; *Garvey v. Railroad Co.* 159 N. Y. 323, 333, 54 N. E. 57; *McSorley v. Gomprecht* (Super. N. Y.) 26 N. Y. Supp. 917, and cases cited. Draw decision and judgment in accordance with these views, and settle on three days' notice.

Judgment accordingly.

BOECKLER v. MISSOURI PACIFIC RY. CO.

(Missouri Court of Appeals, 1881, 10 Mo. App. 448.)

THOMPSON, J. . . . A court of equity will never grant an injunction to restrain a trespasser upon real property merely because he is a trespasser; the trespass threatened and committed must be of a nature permanently to injure or destroy the inheritance, or otherwise inflict such irreparable mischief as is not susceptible of adequate compensation by way of pecuniary damages. *Weigel v. Walsh*, 45 Mo. 560; *Burgess v. Kattleman*, 41 Mo. 480; *James v. Dixon*, 20 Mo. 79. Under this rule, an injunction was granted, where the trespass was such as would destroy the plaintiff's dwelling-house or render

it unfit for habitation. *Echelkamp v. Schrader*, 45 Mo. 505. It was also granted in another case to restrain a railroad company from operating its road over the plaintiff's land, unless it should pay into court the damages assessed for the taking of the land, the company being insolvent. *Evans v. Railroad Co.*, 64 Mo. 453. And, it may be added that courts of equity will generally interfere to restrain trespasses threatened by persons who are insolvent, because, in such a case, an action for damages would obviously afford no adequate remedy. But there is no suggestion in the record that the defendant in this case is insolvent.

How does the present case stand with reference to these principles? Stating it most strongly in favor of the plaintiff, it may be assumed that the plaintiff has long been the owner of a lot of ground in South St. Louis, which fronts on the Mississippi River, and which is chiefly valuable for that reason; that in 1872, defendant's grantor, the Pacific Railroad, tortiously entered upon this lot and built a railway spur or side track diagonally across it, upon a trestle-work, about twelve feet high; and that the defendant's grantor, the Pacific Railroad, and the Atlantic and Pacific Railroad Company, under a lease from the Pacific Railroad, and since the beginning of the year 1877, the defendant itself, have been using this track by running trains back and forth over it at frequent intervals,—and all this without the consent of the plaintiff and against her will, and without having condemned and paid for the land as required by the laws of this state.

What more is this than a partial or total disseisin of the plaintiff, for which she may have adequate compensation in an action at law for damages? There are here none of the elements which are found in cases where courts have enjoined trespasses upon real property; no severing from the realty and carrying away of valuable timber, stone, or ores; no injury to the inheritance; no destruction or invasion of the plaintiff's habitation; no insolvency of the defendant. Without intimating an opinion whether it is a proper case for ejectment, it is clear that she may maintain an action for the damages which she has sustained through the trespass; or that, waiving the tort, she may maintain an action as on an implied contract for the rental value of the premises during the time the defendant has thus occupied them. We see nothing in the facts of this case to distinguish it in principle from the constantly recurring case where one man tortiously occupies the

vacant land of another, puts a dwelling-house or other building upon it, and goes in and out of it by himself and his servants from day to day. In such a case, if nothing further appears, it is clear that an injunction will not be awarded; for to do so would be to substitute the discretion of the judge in a suit in equity for the verdict of a jury in an action of trespass or ejectment—a thing which our law does not countenance.

“Where the trespass complained of,” says Mr. High, “consists in the erection of buildings upon the complainant’s land, a distinction is taken between the buildings when in an incomplete, and when in a finished state. And while the jurisdiction is freely exercised before the completion of the structures, yet if they have been completed, the relief will generally be withheld, and the person aggrieved will be left to his remedy by ejectment.” 1 High on Inj. (2d.), sect. 707. We do not perceive a distinction in principle between the case of the erection of a building, and the erection of a side-track by a railway company.

Nor do we think this is a case for this relief on the ground that the trespass is continuous in its nature. We agree with the learned judge of the Circuit Court, in the opinion delivered by him, that “the continuous character of the trespass is a fact to be regarded, but it is not sufficient in itself, without other circumstances, to authorize injunctive relief.” It is obvious that if that were not so, any continuing dispossession by a trespasser would authorize an injunction, and the remedy would thus become a complete substitute for ejectment. . .

TURNER v. STEWART.

(Supreme Court of Missouri, 1883, 78 Mo. 480.)

MARTIN, C. This was a petition for an injunction, the substance of which we recite. The plaintiff states that he is the owner and in possession of a private wharf and landing on the west side of the Osage River; that he is engaged in operating a saw-mill and machine for loading and unloading cars with railroad ties, which mill and machine he has erected on said premises at great expense; that he is under contract to furnish and deliver a large amount of lumber to different parties, and that he has a large number of hands in his em-

ployment conducting his said business; that the defendants are the owners and proprietors of a steamer called the "Aggie;" that without the consent of plaintiff and against his notice forbidding it, said defendants have at divers times since the 7th day of May, 1880, landed their said steamer at said landing and discharged freight on said premises, and that they threaten to repeat and continue said unlawful acts and trespasses; that by reason thereof the business of plaintiff in sawing, receiving and delivering lumber, and loading and unloading railroad ties is wholly suspended and stopped during the time of said acts and trespasses; that defendants are in the habit of landing and discharging freight and thereby interfering with and suspending the said business of the plaintiff as often as two or three times each week, varying from a half day to a whole day; that he is damaged to such an extent that an ordinary action at law would be a wholly inadequate remedy for the injury sustained, and that a continuation of said acts would work an irreparable damage for which a court of law provides no adequate remedy; wherefore the order of the court enjoining defendants from further trespasses aforesaid is asked by plaintiff, and such other and further relief as he may be entitled to.

To this petition the defendants filed a demurrer for want of facts sufficient to constitute a case of action. It is urged that an injunction will not be granted to restrain trespasses unless the parties are insolvent or the injury irreparable. It is also insisted that the jurisdiction of the matter complained of belongs to the courts of admiralty and not to the State courts. The court sustained the demurrer and thereupon entered final judgment dismissing the petition, from which action of the court the plaintiff presents his writ of error.

It is not necessary that the defendant should be insolvent or the wrong irreparable to sustain the right to equitable relief against trespasses. It is provided in our statute that "the remedy by writ of injunction shall exist in all cases when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." R. S. 1879. §2722. The business of the plaintiff was constantly interrupted at the pleasure of the defendants. He was subjected to a grievance recurring at irregular intervals. His immediate damages would be difficult to estimate on account of the nature of his business. For consequential damages and loss of profits on his contracts it would be difficult if not

impossible to obtain anything in an action at law. It is also clear that no single action for damages would afford him redress. He would have to sue for every time the defendant landed; and the burden of carrying on such a multiplicity of law suits would make his remedy about as grievous as the injury. Under this statute and the decisions construing it, I am satisfied the plaintiff was entitled to the remedy asked for, and that a suit at law would not be an adequate remedy. . .

DEES v. CHEUVRONT.

(Supreme Court of Illinois, 1909, 240 Ill. 486, 88 N. E. 1011.)

This was a bill for injunction filed to the March terms, 1908, of the circuit court of Crawford county by appellees, to restrain the appellants, their agents, servants, employees, successors and assigns, from drilling for oil or gas on one acre of land situated in the south-west corner of the south-east quarter of the south-west quarter of section 21, township 7, north, range 13, west, in said county. . . .

From the facts set out in the bill it appears that Daniel G. Dees and Viola Dees conveyed by warranty deed to the school trustees of said township, November 5, 1878, a certain described one-fourth of an acre of land, "so long as is kep for school perpesis hold said possession in the school trustees after it is not use said perpice is to come to said Daniel G. Dees or his heirs or assigns." The same grantor gave to the same grantees a quit-claim deed May 3, 1892, to one acre in the south-west corner of said quarter-quarter section, stating therein: "This deed made to the trustees of schools so long as it shall be used as a school house site, and whenever it shall be discontinued as a school house site then to revert to the grantors." It is agreed that this last named acre included within its boundaries the one-fourth of an acre conveyed in the former deed. The bill set forth that since the execution of said deeds the property has been held by the school trustees and used for the purposes provided in said deeds; that on May 3, 1902, the school directors of school district No. 7, (which includes said land,) and the said school trustees of said township, signed a lease with C. F. Kimmel, one of the appellants, under which Kimmel claims the right to go upon said land and drill for and remove oil and

gas; that the drilling for oil and the removal of the same from said tract of land is not the using of said land for the purpose for which it was granted to said school trustees, and would result in irrevocable injury to said land and to the possible reversion of appellees. . . .

CARTER, J. The first question presented for consideration is the nature of the interest that appellees have in this land. The deeds in question created in the grantees a base or determinable fee, and the only right left in the grantor was not a vested future estate in fee, but only what is called "a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs." (*North v. Graham*, 235 Ill. 178; *Presbyterian Church v. Venable*, 159 id. 215; *O'Donnell v. Robson*, 239 id. 634.) Under these decisions it must be held to be the settled law of this State that the interest of appellees in the land in question was only a possibility of reverter. It then remains for us to consider whether this was such an interest as entitles the appellees to the relief prayed for and allowed in the trial court.

It is not alleged in the bill or contended in the brief that the land in question is not still used as a school house site, or that the exercise of the right granted by the lease to Kimmel to go on said land and drill for oil would in any way interfere with such use of the land. Apparently appellees have not filed their bill for the purpose of having this base fee determined by the court on the ground that it had been defeated by non-compliance with the conditions in the said deed. Appellees seek rather through a court of equity to direct said school trustees and directors as to the use of said property. On this record it must be held that the land is still used for the purposes set out in the deeds and that the title to the estate granted by said deeds is still held by the trustees of schools. This court, in *Gannon v. Peterson*, 193 Ill. 372, stated that equity would interfere to enjoin equitable waste by the owner of a base or determinable fee only when it is made to appear that the contingency which will determine the fee is reasonably certain to happen and the waste is of such character that a court of equity can say that the party is charged with a wanton and conscienceless use of his rights, and we there held that equity would not enjoin the owner of a base fee from leasing coal mining privileges. The doctrine laid down in that case was re-affirmed in *Fifer v. Allen*, 228 Ill. 507.

We are compelled to hold that appellees have shown no present estate in the land,—nothing but an expectancy; a mere possibility of

reverter; a right not now capable of being valued. No estate is vested in appellees and none may ever vest. A court of equity, in its ordinary jurisdiction, cannot protect a mere expectancy.

The decree of the circuit court is reversed and the case remanded to that court, with directions to enter a decree dismissing the bill.

Reversed and remanded, with directions.

WARLIER v. WILLIAMS.

(Supreme Court of Nebraska, 1897, 53 Neb. 143.)

RAGAN, C. In the district court of Burt County, John Warlier brought this suit in equity against Charles Williams and others, alleging, in substance, in his petition that he was the owner, and in the actual possession, of a certain tract of land described in said petition; that, at the time of the conveyance of said land by the government of the United States to his grantor, the Missouri river constituted one of its boundaries; that the tract conveyed by the United States government since that time has been enlarged by accretions from said river; that the parties made defendants, against his protest and without any right or color of title or authority, had forcibly entered into possession of the lands formed by said accretion; had "squatted" thereon; and, at the bringing of the suit, were using and cultivating said lands and appropriating to themselves the crops grown thereon; that said defendants and each of them were wholly insolvent; that if they were permitted to remain in possession of said land for ten years they would acquire title thereto by adverse possession. The prayer was that the defendants might be enjoined from continuing in possession of said lands. To this petition the district court sustained a general demurrer and dismissed Warlier's action, and he brings this judgment here for review on error.

The proceeding is, in effect, an application to a court of equity for a mandatory injunction to remove the defendants in error from the real estate of the plaintiffs in error upon which they have forcibly and wrongfully entered and are wrongfully occupying. Counsel for the plaintiff in error has cited us to numerous cases which he claims sustain his right to this extraordinary remedy; but an examination of

all these cases discloses that not one of them is in point. A litigant cannot successfully invoke the extraordinary remedy of injunction to enforce a legal right unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate,—that it, that the pursuit of those remedies, or some of them, will not afford him as prompt and efficacious redress as the remedy by injunction. This we understand to be elementary law. (*Richmond v. Dubuque & S. C. R. Co.*, 33 Ia. 422; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *Pomeroy*, Equity Jurisprudence, secs., 221, 275, 1346, 1347, 1357.) Now the facts stated in the petition of the plaintiff in error show simply this: That the defendants in error have forcibly entered upon and are occupying his real estate. The plaintiff in error has the legal title and is in possession of this real estate. He might then institute against these defendants in error an action of forcible entry and detainer under chapter 10 of the Code of Civil Procedure, section 1020 of which expressly provides that such an action may be brought against a defendant who is a settler or occupier of lands without color of title and to which the complainant in the forcible detainer suit has the right of possession. Here, then, is a plain statutory remedy for the wrong of which the plaintiff in error complains in this action. Is this remedy an adequate one? The statute provides that this action of forcible entry and detainer may be brought before a justice of the peace after giving the parties in possession of the lands three days' notice to quit; that no continuance for more than eight days shall be granted in the case unless the party made defendant shall give bond for the payment of rent, and if the judgment shall be entered in favor of the plaintiff, a writ of restitution shall be awarded in his favor, unless appellate proceedings are taken by defendants, in which case they shall give a bond to pay a reasonable rent for the premises while they wrongfully detain the same. This remedy is not only an adequate one but it is a summary and a speedy one. The relief demanded by the plaintiff in error in this injunction proceeding is the ousting of the plaintiff in error from his real estate so that he may have the exclusive possession of it. A judgment and a writ of restitution in a forcible entry and detainer suit would afford him the same and a more speedy redress than a proceeding by injunction. But it is said by the plaintiff in error that he is entitled to pursue the injunction remedy because of the insolvency of the defendants in error. This argument, as applied

to this case, is untenable. If the defendants in error are insolvent, then the plaintiff in error has no redress for the costs and expenses that he may incur in prosecuting either an injunction suit or a forcible entry and detainer suit. Another argument is that the proceeding by injunction will avoid a multiplicity of suits. This argument we also think untenable. We do not understand the mere fact that there exist divers causes of action which may be the foundation of as many different suits between the parties thereto is a ground upon which equity may be called upon to assume jurisdiction and settle all such matters in one suit. (Chief Justice Beck in *Richmond v. Dubuque & Sioux City R. Co.*, *supra*.) The district court was right and its decree is
Affirmed.

OWENS v. CROSSETT.

(Supreme Court of Illinois, 1883, 105 Ill. 354, 357.)

WALKER, J.—This was a bill in equity, filed by appellants, to enjoin appellee from removing the fence on the opposite sides of a field, where it is claimed a road enters and passes through the field. Complainants deny that there is any regular, legally laid out or established road that passes through the field, and defendant claims there is, and justifies his acts on the ground that he is a road commissioner, and has the right and that it is his duty, to remove the fence as an obstruction, and keep the road open and free to travel by the public. These are the grounds of the controversy.

It is first urged in affirmance of the decree dismissing the bill, that it will not lie to enjoin a trespass. Such is undoubtedly the rule where it is a simple trespass to property, and is but a single act, and the person committing or threatening the trespass is able to respond in damages; but where he is insolvent, and repeated trespasses of a grave character are threatened to be repeated, equity will interfere to prevent the wrong, by restraining the threatened trespass. Here, the fence had been removed a considerable number of times, and it is admitted that defendant had said he would, and intended to, remove it as often as it should be replaced, and that he has no property subject to execution. This brings the case within the exception to the

general rule, and authorized the court to entertain jurisdiction of the case, because there was not an adequate remedy at law, and also to prevent a multiplicity of suits at law. . . .

HATTON v. KANSAS CITY, ETC., R. R.

(Supreme Court of Missouri, 1913, 253 Mo. 660, 160 S. W. 227.)

FARIS, J. This is a proceeding in equity whereby plaintiffs seek to enjoin the defendant from entering certain real estate, averred in the petition to be an abandoned right of way of defendant, and removing therefrom certain right-of-way fences, steel rails, ties, bridges,*abutments and cattle guards.

The proof does not disclose wherein the railroad track or the right of way in question, or the rails in controversy, differ from any other track, or right of way or rails. Regardless of whether in the absence of a motion to make more definite and certain the statement in the petition herein that the damage accruing to plaintiffs is irreparable, is as a conclusion of law sufficient here (regard being had to the form of the attack on the petition), we are yet met by the fact that it is incumbent on plaintiffs when they come to make out their case to show by testimony that their damage will in fact be irreparable.

It is true that our statute permits the use of the remedy by injunction in all cases where "an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." (Sec. 2534, R. S. 1909.) It would be clear to us even if counsel for plaintiffs had not ingenuously and candidly admitted it, that the real controversy here is over the rails, and such other property, if any such there be of value, now remaining on the old right of way. Many cases occur to us wherein the necessity of an interference by injunction might arise within the purview of this section. For example, in case of the threatened loss or destruction of personal property, as a wedding present or an heirloom having a special or affection value, but whose real value is negligible, or out of proportion to the esteem in which the owner holds it; or in case of the entry upon lands and the threatened destruction of shade trees. These, we opine, as well as many others of similar

sort, would be special reasons taking the case out of the general rule and bringing it within the statute. (*McPike v. West*, 71 Mo. 199.) But nothing is clearer than that when we pass beyond the usual domain of equity, but invoke its interference because of some other sort of threatened irreparable injury, or lack of an adequate remedy by an action for damages, the special reasons must be shown by the proof. That is what the statute itself says in effect. The proof must follow the allegations of the petition and create in the mind of the chancellor the opinion that "an adequate remedy cannot be afforded by an action for damages." (*Weigel v. Walsh*, 45 Mo. 560.) There is no such proof in this record. Defendant is not shown or averred to be insolvent. If there has been by abandonment, a reverter of the right of way to the grantor thereof, or to the assignee of the grantor, and defendant enter thereon, will not such entry constitute an actionable trespass? If defendant take up and carry away and convert to its own use the rails upon said right of way, will not an action lie for conversion, if it be true that the title to these rails has for any reason passed to plaintiffs? There is naught in the proof, or for that matter in the petition either to negative either of these propositions. . . .

SECTION III. PRIVATE NUISANCE.

RANKIN v. CHARLESS.

(Supreme Court of Missouri, 1854, 19 Mo. 490.)

SCOTT, J. . . . The verdict establishes the fact, that the defendant has unlawfully made use of the building of the plaintiff as a support to the joists of his house, and the only question that arises is, what remedy or judgment is warranted in law by the verdict of the jury? The present practice act having blended the jurisdiction of courts of law and equity, it would seem that the

plaintiff is entitled, in this proceeding, to all the relief that would formerly have been afforded both by a court of law and equity.

According to the definition of a nuisance, which is said to be a wrongful act or neglect of one man, in the use or management of his land, which occasions damages to the possession or easement of his neighbor, or to a public easement, it may be questioned whether the injury complained of is a nuisance or not. Gibbon, 360. A purpresture is a species of nuisance, but that term is only applied to an encroachment on land belonging to the public. Coke, 177. But, although the act complained of may not be a technical nuisance, to be redressed by the remedies appropriate by law for that species of wrong, yet it is clearly an injury, entitling the party affected by it to an action for its redress.

The record in this case only presents the petition of the plaintiff, the answer of the defendant, and the verdict and judgment. The petition substantially alleges that the defendant, in building his house, used the wall of the plaintiff's house, (who was building simultaneously,) for a support to the joists of his building. The defense, was a license to use the wall. The verdict of the jury awarded damages to the plaintiff for the act complained of.

It seems that, in the opinion of the court below, an erroneous judgment was entered on this verdict, and so much of it as decreed that the joists be removed from the wall, that the holes made by the insertion of the joists, be filled with brick and mortar, as strongly as it may be done, and that the plaintiff have execution against the defendant in conformity to this judgment and decree, was stricken out, and it was thus left a judgment for the damage assessed.

Even if the injury complained of was a nuisance, yet it is well known that, in an action on the case, for such a wrong, no judgment for the abatement of it is given. That judgment was only proper in the old writ of assize of nuisance, and in a *quod permittat prosternere*. 3 Black. 219. But these ancient remedies have fallen into disuse, if they have not been abolished, and the action on the case, and the writ of injunction are now the usual remedies for a nuisance. But courts of equity do not, as a matter of course, interfere in all cases of this kind. That interposition can only be demanded to restrain irreparable mischief, or to suppress oppressive or interminable litigation, or to prevent a multiplicity of suits.

No injunction will be granted unless the act done or contemplated is, or will clearly be, a nuisance. If a party sees a nuisance in progress, and does not interfere to prevent it, he will forfeit his right to assistance from a court of equity. *Jones v. Royal Canal Co.*, 2 Molloy, 319; *Williams v. Earl of Jersey*, 1 Craig & Phillips, 91; *Gibbon on Nuisances*, 403.

As the record is barren of all the circumstances attending this transaction, no reason is perceived why if the extraordinary powers of a court of chancery are exerted in this case, they may not in every complaint of a nuisance. It is allowable for a party to take the redress of wrongs of this character into his own hands. This was a case eminently proper for the exercise of such a right. Had the injury been redressed by the party at the moment it was done, the consequences would have been by no means so serious as they must be at this time, by granting the relief prayed. The injury has been done. It cannot now be prevented. It may be redressed.

Whether it would be more equitable to let it remain, and leave the plaintiff to his remedy at law, we cannot say, as the facts necessary to a determination of that question are not before us. To tear down the house of the defendant now, might look more like revenge than the legal reparation of an injury. It is no part of the business of tribunals of justice to minister to the angry passion of men. If the defendant will wantonly persist in his encroachments on the rights of the plaintiff, it is in the power of the courts of law to award such damages as will arouse him to a sense of his continued injustice.

The other judges concurring, the judgment is affirmed.

WHIPPLE v. McINTYRE.

(Court of Appeals of Missouri, 1896, 69 Mo. App. 397.)

BLAND, P. J. William A. Whipple brought this suit against Robert J. McIntyre for keeping upon his lot a pig pen so near to the dwelling house of Whipple as to be injurious to the health and to detract from the comfort of Whipple and his family. . . .

The petition was treated as a bill in equity, as for injunction, and was so tried before the court. After the evidence was all in, the court

entered a judgment dismissing the bill for want of equity. The allegation of damages was ignored throughout the trial and no finding was made upon that issue. This was a misconception of the cause of action, as stated in the petition. The action is for damages on account of the alleged nuisance, and a prayer for injunction to prevent its continuance. The petition does not join two separate causes of action in one count. It states but one cause of action (the maintenance of a private nuisance), and asks double relief, the assessment of damages, and the injunctive process of the court to prevent the continuance of the nuisance, from which damages would continue to daily accrue. In *Ware v. Johnson*, 55 Mo. 500, it is intimated that this lands in considerable quantities, and that the overflow has continued up to the filing of the bill, and that it could come from no other source. The weight of the evidence supports this view. The injury to the complainant is irreparable not in the sense that no amount of money could compensate him for it, but as a deprivation of the enjoyment may be done. Judge Bliss in his work on Code Pleading, speaking of cases of this kind, says: "The double relief is improperly spoken of as a union of two causes of action, . . . Under the Code there is but one count, and one form of action, and by a single complaint the aggrieved party may have all the relief to which he is entitled." Bliss, *Code Pleading* (2 Ed.), secs. 166,167,168,169,170,171.

The evidence in this case abundantly establishes the fact that McIntyre maintained on his premises a hog pen, within a few feet of Whipple's dwelling house, and was maintaining it at the date of the trial. That noxious and offensive odors from this pen polluted the air (when allowed to circulate) in the rooms of Whipple's dwelling, is clearly and abundantly proven. That a pigsty, situated as this was, with reference to Whipple's residence, was a nuisance *per se*, scarcely needs authority to support the proposition. Ordinary experience and observation is sufficient to convince any one, with his olfactory nerves in a normal condition, that a pig pen, within fourteen to eighteen feet of a dwelling house, with windows and doors opening upon it, would materially interfere with the ordinary comforts and conveniences of human existence. This, according to modern law, is sufficient to constitute a private nuisance. Webb's *Pollock on Torts*, 496. But we have judicial authority for pronouncing McIntyre's pigsty a nuisance *per se*. *Broder v. Gaillard*, 45 L. J. Ch. 414; *Reinhart v. Mentasti*,

58 L. J. Ch. 787; Webb's Pollock on Torts, 500; Kirchgraber v. Lloyd, 59 Mo. App. 59, and authorities therein cited; 2 Wood on Nuisances, pp. 792, 793.

It is contended by respondent that appellant can not invoke the injunctive process of the court, until he has first established his right by law. This doctrine is supported by many cases, but it has no application in a case like this where the law denounces the thing complained of as a nuisance *per se*. McDonough v. Roberts, 60 Mo. App. 156, and authorities cited. The law has pronounced in advance, in this case, the pig pen, situated as this one is, with reference to appellant's dwelling, a nuisance. The verdict of a jury finding it to be what the law has already pronounced it to be, would establish no legal right that appellant did not have before the verdict.

Under the evidence and pleading, the plaintiff was entitled to his assessment of damages, but for a nominal sum only, as no particular damages were proven. Following the spirit of the law as laid down by Judge Sherwood in Paddock v. Somes, 102 Mo. 226, we reverse the judgment and remand the case, with directions to the circuit court to enter judgment for plaintiff for one cent damages, and to perpetually enjoin and restrain defendant from further maintaining the nuisance in question.

All concur. Judge Biggs in the result.

Biggs, J. (Concurring).—The opinion holds that the action is at law for damages with a prayer for injunctive relief. I concur in this. I also concur in the direction to enter a judgment for plaintiff for nominal damages, and for the abatement of the nuisance, for the reasons: first, that the undisputed physical facts prove that the pigsty, however clean it might have been kept, was in such close proximity to the plaintiff's dwelling house as necessarily to render it a nuisance; and second, that counsel for plaintiff stated at the argument that the main object of the suit was to abate the nuisance, and not to recover substantial damage. The case of Paddock v. Somes, 102 Mo. 226, furnishes no authority whatever for the disposition made of the case.

GILES v. WALKER.

(Supreme Court of Judicature, 1890, 24 Q. B. D. 656.)

Appeal from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

Toller, for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be charged with negligence, it must be shown that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. (He was stopped by the Court.)

R. Bray, for the plaintiff. If the defendant's predecessor had left the land in its original condition as forest land the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour. The case resembles that of *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5, where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

LORD COLERIDGE. C. J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the

thistles, which are the natural growth of the soil. The appeal must be allowed.

Lord Esher, M. R. I am of the same opinion.

STURGES v. BRIDGMAN.

(In Chancery, 1879, 11 Ch. Div. 852, 862.)

THEISIGER, L. J. The Defendant in this case is the occupier, for the purpose of his business as a confectioner, of a house in Wigmore Street. In the rear of the house is a kitchen, and in that kitchen there are now, and have been for over twenty years, two large mortars in which the meat and other materials of the confectionery are pounded. The Plaintiff, who is a physician, is the occupier of a house in Wimpole Street, which until recently had a garden at the rear, the wall of which garden was a party-wall between the Plaintiff's and the Defendant's premises, and formed the back wall of the Defendant's kitchen. The Plaintiff has, however, recently built upon the site of the garden a consulting-room one of the side walls of which is the wall just described. It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room, and which, unless the Defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The Defendant contends that he had acquired the right, either at Common Law or under the Prescription Act, by uninterrupted user for more than twenty years.

In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the Plaintiff or to any previous occupier of the Plaintiff's house by what the Defendant did. It is true that the Defendant in the 7th paragraph of his affidavit speaks of an invalid lady who occupied the house upon one occasion, about thirty years before, requested him if possible to discontinue the use of the mortars before eight o'clock in the morning; and it is true also that there is some evidence of the garden wall having been subjected to vibration, but this vibration, even if it existed at all, was so slight, and the complaint, if it could be called a complaint, of the invalid lady, and can be looked upon as evidence, was of so trifling a character, that, upon the maxim *de minimis non curat lex*, we arrive at the con-

clusion that the Defendant's acts would not have given rise to any proceedings either at law or in equity. Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventible nor actionable found an easement? We think not. The question, so far as regards this particular easement claimed, is the same question whether the Defendant endeavors to assert his right by Common Law or under the Prescription Act. That Act fixes periods for the acquisition of easements, but, except in regard to the particular easement of light, or in regard to certain matters which are immaterial to the present inquiry, it does not alter the character of easements, or of the user or enjoyment by which they are acquired. This being so, the laws governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. Upon this principle it was decided in *Webb v. Bird* (13 C. B. (N. S.) 841) that currents of air blowing from a particular quarter of the compass, and in *Chasemore v. Richards* (7 H. L. C. 349) that subterranean water percolating through the strata in no known channels, could not be acquired as an easement by user; and in *Angus v. Dalton* (4 Q. B. D. 162) a case of lateral support of buildings by adjacent soil, which came on appeal to this Court, the principle was in no way impugned, although it was held by the majority of the court not to be applicable so as to prevent the acquisition of that particular easement. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your con-

sent to your neighbor enjoying something which passes from your tenement to his, as to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases—the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action. *Webb v. Bird* and *Chasemore v. Richards* are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it; for until the noise, to take this case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of the consent, viz., the power of prevention physically or by action, was never present.

It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavory character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square

would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equal degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbor, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to the individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the court below took substantially the same view of the matter as ourselves and granted the relief which the Plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs.

SAWYER v. DAVIS.

(Supreme Court of Massachusetts, 1884, 136 Mass. 239.)

Bill of Review, alleging the following facts:

The plaintiffs, who were manufacturers in Plymouth, were restrained by a decree of this court, made on October 1, 1881, upon a bill in equity brought by the present defendants, from ringing

a bell on their mill before the hour of six and one half o'clock in the morning; which decree was affirmed by the full court on September 7, 1882. (See *Davis v. Sawyer*, 133 Mass. 289.) On March 28, 1883, the Legislature passed an act, which took effect upon its passage, as follows: "Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weights, in such manner and at such hours as the board of aldermen of cities and selectmen of towns may in writing designate." (St. 1883, c. 84). On April 18, 1883, the selectmen of Plymouth granted to the plaintiffs a written license to ring the bell on their mill in such manner, and at such hours, beginning at five o'clock in the morning, as they were accustomed to do prior to the injunction of this court.

The prayer of the bill was that the injunction might be dissolved, or that the decree might be so modified as to enable the plaintiffs to act under their license without violating the decree of this court; and for other and further relief.

The defendants demurred to the bill, assigning, among other grounds of demurrer, that the St. of 1883, c. 84, was unconstitutional, so far as applicable to the defendants. . . .

C. ALLEN, J. Nothing is better established than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft v. Cambridge*, 126 Mass. 438, 441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable

disturbance in the enjoyment of his property. *Merrifield v. Worcester*, 110 Mass. 216, 219. In this conflict of rights, police regulations by the Legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if, in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the Legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. *Bancroft v. Cambridge*, 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the Legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise

of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. . . .

Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the Legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Commonwealth v. Alger*,⁷ Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. *Munn v. Illinois*, 94 U. S. 113, 134.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the Legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character, it is not unlike numerous other instances to be found in our statutes, where the Legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference

may also be made to the statutes regulating the use of stationery steam engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables, and bowling alleys. . . .

It is then argued that the Legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him, his remedy cannot be cut off by an act of the Legislature. So, also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But on the other hand, the Legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge, but, within this limitation, the exercise of the police power of the Legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell; and that afterwards a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen; and that these manu-

facturers had then proceeded to ring their bell at other hours, not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of the injunction. In respect to such a state of facts, an injunction can never be said to be final, in the sense that it is absolute for all time. Even without any new legislation affecting the rights of the parties, with an increase of their own business and a general increase of manufacturing and other business in the vicinity, and of a general and pervading change in the character of the neighborhood, it might be very unreasonable to continue an injunction which it was in the first instance entirely reasonably and proper to grant. The ears of the court could not under such new circumstances be absolutely shut to an application for its modification, without any new statute declaring the policy of the Commonwealth in respect to any branch of business or employment. But a declaration by the Legislature that, in its judgment, it is reasonable and necessary for certain branches of business to be carried on in particular ways, notwithstanding the incidental disturbance and annoyance to citizens, is certainly a change of circumstances which is entitled to the highest consideration of the court; and in the present case we cannot doubt that it is sufficient to entitle the plaintiffs to relief from the operation of the injunction. . . .

Demurrer overruled.

ELLIS v. KANSAS CITY, ETC., R. R. CO.

(Supreme Court of Missouri, 1876, 63 Mo. 131.)

NORTON, J. This was an action brought by plaintiff in the special law and equity court of Jackson county, to recover damages for a

nuisance. It is alleged in the petition that the plaintiff and her husband and their children were living in a certain house in Platte county of which her husband had the possession, situated about forty yards from the railroad track of defendant; that during their occupancy of said house the defendant, by their locomotive, ran against and killed a horse, directly opposite the house occupied by plaintiff, and permitted the same to remain on the side of their railroad track for about two weeks, during which time, by the decomposition of the carcass, the surrounding atmosphere became so noxious and offensive as to render the house occupied by the plaintiff unwholesome, and caused her to become seriously sick. The answer denies all the material allegations of the petition. . . .

The defendant, in permitting the horse killed by its locomotive to remain on the side of the track, so near the house occupied by plaintiff and her husband as to render its occupancy unwholesome, was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house. The right of action in this case was in the husband of plaintiff, he being the occupier and in the rightful possession of the house with his family by contract with the owner of the property. Had the husband brought this suit it could have been maintained, and on the trial he would have been permitted not only to show the sickness of himself, but also the sickness of his wife, his family, and the different members thereof, as a measure for the recovery of damages. (*Story v. Hammond*, 4 Ohio, 376; *Kearney v. Farrell*, 28 Conn. 317.) . . .

We have not been able to find any authority which would authorize us to declare that each member of the family of the occupant of a house affected by a private nuisance could maintain an action therefor, which would follow if the views contended for by plaintiff are correct. In an action to recover damages for a nuisance of the character complained of, the plaintiff must prove possession of the house, the injurious act complained of, and the damages resulting therefrom. (2 Greenl. Ev. § 470.) . . .

KUZNIAK v. KOZMINSKI.

(Supreme Court of Michigan, 1895, 107 Mich. 444, 65 N. W. 275).

LONG, J. The parties to this cause own adjoining lots in the city of Grand Rapids. Defendants' lot is on the southeasterly corner of Eleventh and Muskegon streets, and upon which is a large tenement house facing both streets. The complainant owns the lot immediately south and adjoining the defendants', and upon which he has a dwelling house facing Muskegon street, and also a tenement house about 60 feet back from Muskegon street, and within 22 inches of the north line, being the line of defendant's lot. At the time this tenement house was erected, defendants had upon their lot what was called a "chicken shed;" and, after complainant's tenement house was erected, defendants moved this chicken shed upon a part of their lot directly opposite complainant's tenement house, and within 24 inches of the lot line, and converted it into a coal and wood house for the use of their tenants, who occupied the dwelling on said lot. This bill was filed by complainant for the purpose of having this coal and wood house of defendants declared a nuisance, and to compel them to remove the same. The claim made by the bill is that the defendants removed the building to that place through spite and from a malicious motive, and not because it was needed for any useful purpose. Defendants answered the bill, denying that they were actuated by malice in putting the building there, and averred that it was so placed for the use of their tenants for wood and coal. The testimony was taken in open court, and the court found that the building was a nuisance, and a decree was entered directing the defendants to remove the building within 60 days from the date of the decree, and that, in default of such removal, the sheriff of the county remove the same, at the cost and expense of defendants. The complainant was awarded the costs of the suit. Defendants appeal.

It was held in *Flaherty v. Moran*, 81 Mich. 52, that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, was a nuisance, and the decree of the court below ordering its removal was affirmed; but that decision was placed on the ground that the fence served no useful purpose, and was erected solely from a malicious motive. In the present case the

building erected by the defendants was for a useful purpose; and, while there may have been some malice displayed in putting it so near complainant's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in complainant to have the building removed. Defendants had a right to erect a building upon their own premises, and the decisions have been quite uniform to the effect that the motives of a party in doing a legal act cannot form the basis upon which to found a remedy. In *Allen v. Kinyon*, 41 Mich. 282, it was held that the motive is of no consequence when the party does not violate the rights of another. In *Hawkins v. Sanders*, 45 Mich. 491, it was held that there was no right of prospect which would prevent the erection of an awning on a neighboring lot. The case does not fall within the rule of *Flaherty v. Moran*, *supra*, and the court below was in error in directing the removal of the building. That decree must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts to the defendants.

The other Justices concurred.

WARREN v. PARKHURST.

(New York Court of Appeals, 1906, 186 N. Y. 45, 78 N. E. 579.)

BARTLETT, J. This action is brought against forty defendants in the city of Gloversville. . . .

The plaintiff, for the last ten years, has owned, and now owns, a lot of land and dwelling house on this canal, occupied for residential purposes and the maintenance of a meat market. The defendants for the last six years have discharged, and do now discharge, each from his own place of business into Cayadutta creek, large quantities of filthy matter and tannery and factory refuse and harmful and polluting substances, solid and liquid, thereby polluting the waters and bed and banks of the creek, rendering them offensive to the senses and occasioning deposit in the canal and upon the lands of the plaintiff thereon, rendering them less useful for domestic purposes. By reason of this pollution of the canal disagreeable and noxious odors have arisen, continually pervading the plaintiff's dwelling house and

meat market, destroying the comfort of the plaintiff and his tenants in the use of his property and diminishing the value thereof and rendering the premises unhealthful. Each defendant maintains permanent drains and sluices for carrying such refuse and polluting and harmful substances into Cayadutta creek and intends to continue such discharge thereof and to increase the same unless restrained from so doing. "The damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were not other sources of pollution, would be nominal; but from the concurring and continuous trespass of all the defendants, the injury which the plaintiff and his lands sustain is great and if the said nuisance is continued will be irreparable and the said lands and tenements will be rendered wholly worthless for domestic or for other purposes." . . .

The principles of equity jurisprudence applicable to the determination of this appeal have never been more clearly stated by any tribunal in the United States or more thoroughly or ably discussed than in the opinion of the Supreme Judicial Court of Maine in the case of *Lockwood Co. v. Lawrence* (77 Me. 297). The nuisance which was the subject of complaint in that case arose out of the deposit in a river of the waste from sawmills by several owners and proprietors of such sawmills acting independently of one another. The refuse material and debris arising from the operation of their separate sawmills was carried down the river and commingled into one indistinguishable mass before it reached the premises of the complainant, where it was deposited in such quantities as to constitute a nuisance. Objection was made to the joinder of the several defendants in one bill on the ground that the cause of action was distinct and several as against each of them, it being expressly alleged in the bill that each was independently working his own saw mill without any conspiracy or preconcert of understanding or action with the others. This objection was held to be untenable, inasmuch as there was cooperation in fact in the production of the nuisance. "The acts of the respondents," said Foster, J., "may be independent and several, but the result of these several acts combine to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action."

Another leading case in which the same rule was applied is *Draper v. Brown* (115 Wis. 361), which was a suit in equity against a
1 Eq.—18.

number of defendants to restrain the commission of acts resulting in a nuisance and consequent injury of the property of the plaintiff. The gravamen of the action was the unlawful lowering of the waters of a lake below their accustomed level, the plaintiff alleging that some of the defendants who owned a mill dam at the outlet of the lake drew an excessive quantity of water therefrom; that other defendants withheld the natural flow of a river running into the lake, and that still another obstructed the flow of the river, thereby diminishing the quantity of the water which reached the lake. It was contended that two or more causes of action were improperly united in the complaint, but the court held that the complaint stated but one cause of action in which all the defendants were interested inasmuch as though all the defendants acted independently and without concert their acts united and concurred in producing the injurious result. The fact that the parties were acting without concert was declared to be no defense to an equitable action for injunctive relief if their acts contributed in some appreciable degree to produce the conditions sought to be repressed. . . .

In the decisions of the English courts we also find precedents for the maintenance of such a suit in equity as that before us. In *Thorpe v. Brumfitt* (L. R. (8 Ch. App.) 650) Thorpe, the lessee of an inn, brought an action against Morrell, Brumfitt and other tenants of Morrell for an injunction to restrain the defendants from blocking up or obstructing a right of way leading to the inn. The obstruction complained of was caused by allowing carts and wagons to remain stationary in the passage in course of loading and unloading so as to obstruct access to the yard of the inn. The master of the rolls made a decree declaring that the plaintiffs and the defendants had an equal and reciprocal right to the use of the roadway, but that none of the persons interested were entitled to place or to leave any stationary obstruction in such roadway except at such times as the use thereof was not required for any of the other persons interested therein, and he granted an injunction in accordance with this declaration. The decree and injunction were affirmed in the Court of Appeal and Lord Justice James in his opinion sustained the proposition that the acts of several persons may constitute a nuisance which the court will restrain when the damage occasioned by the acts of any one if taken alone would be inappreciable. He said: "Then it was said that the plaintiff alleges an obstruction caused by several persons

acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way; that may cause a serious inconvenience which a person entitled to the use of the way has a right to prevent, and it is no defense to any one person among the hundred to say that what he does causes of itself no damage to the complainant." . . .

Judgment affirmed.

SOLTAU v. DE HELD.

(In Chancery, 1851, 2 Sim. (N. S.) 133.)

Previously to 1817, a mansion-house in Park Road, Clapham, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March 1817, the plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had ever since resided in it with his family. The other messuage was occupied as a private residence up to July, 1848, when it was purchased by a religious order of Roman Catholics, called "The Redemptorist Fathers;" and they converted the ground floor into a chapel, and appointed the defendant, who was a priest of the Roman Catholic church, to officiate in it. In August, 1848, the defendant caused a wooden frame to be erected on the roof of the last-mentioned messuage, and a bell to be hung in it, which was rung, by his direction, five times on Monday, Tuesday, Wednesday, Thursday and Friday; six times on Saturday, and oftener on Sunday in every week: the ringing ordinarily commenced at five in the morning, and continued for ten minutes, to the great discomfort and annoyance of the plaintiff and his family. . . .

In May, 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that month, and, on that occasion, six bells, which had been placed in the belfry of the steeple, were rung nearly the whole day. . . .

The chapel bell and church bells were, subsequently to 20th of May, rung daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November, 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the plaintiff, or the members of his family, to read, write or converse in his house: that the ringing of the chapel bell and church bells was an intolerable nuisance to the plaintiff, and if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the plaintiff to reside any longer in his house: that in consequence of the before-mentioned grievance, the plaintiff applied to the defendant to desist from ringing the said bells or any of them, so as to occasion any annoyance to the plaintiff; and the defendant, having refused to comply with that application, the plaintiff, in June, 1851, commenced an action against the defendant to recover damages for the nuisance committed to him, by means or in consequence of the before-mentioned ringing of the said bell or bells: that the action was tried on the 13th of August, 1851, when a verdict was found for the plaintiff, with forty shillings damages and costs: that, on the 10th of November, 1851, judgment in the action was signed, and it remained unreversed.

The bill further alleged, that some time after the commencement of the said action, the chapel bell was removed from the roof to one of the sides of the chapel, and after the 13th of August, neither that bell nor the church bells were rung until Sunday the 9th of November, 1851. . . .

The bill prayed that the defendant and all persons acting under his directions, or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung: or that the defendant and such persons as aforesaid, might in like manner, be restrained from tolling or ringing the said bell or bells, permitting the same or any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing at his residence in Park Road, Clapham. . . .

THE VICE-CHANCELLOR: . . . The next ground insisted upon in support of the demurrer, was that the plaintiff had not established his right at law. Now, it is true that equity will only interfere in case of nuisance, where the thing complained of is a nuisance at law: there is no such thing as an equitable nuisance: but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction: but it is not ground of demurrer, as appears from *Berkley v. Ryder*, 2 Vesey, sen. P. 533, and from Lord Cottenham's Judgment in *Elmshirst v. Spencer*, where his Lordship expresses himself thus: "The plaintiff, before he can ask for the injunction, must prove that he has sustained such a substantial injury, by the acts of the defendant as would have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says: "This court will not take upon itself to adjudicate upon the question whether this is a nuisance or not: that must be ascertained in a court of law, as laid down by Lord Eldon in *The Attorney-General v. Cleaver*." Now, in *The Attorney-General v. Cleaver*, which was a case of public nuisance, Lord Eldon directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand over until the hearing of it. Therefore Lord Cottenham, in that case, is referring to this; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is a ground of demurrer because the action has not yet been brought. However, whether that be so or not, the plaintiff in this case has brought his action at law, and obtained a verdict.

Then this ingenious argument was adduced. It was said: "There has been an action at law; but what is now being done, and which you call a nuisance, has never been tried at law. When the trial took place we were ringing every day in the week: we were beginning at five o'clock in the morning, and we were ringing a considerable period of time on each occasion: but now we ring only on Sundays. We ring a fewer number of times, and do not ring so long at a time. Therefore, you must bring your action for this, and try whether this is a nuisance." If that argument were to prevail, see what it would come to. Supposing that, after the trial of the action, the defendant, instead of ringing seven days in the week, had rung six; or, instead of beginning at five o'clock in the morning, had begun

at six; or, instead of ringing for a quarter of an hour, had rung ten minutes each time; and when the plaintiff came into equity to restrain him, he had said: "You have not tried this. When you brought your action, I rang seven days in the week; I ring only six now. I began at five o'clock; I now begin at six in the morning." If that were yielded to, and another action brought and damages recovered, the defendant would reduce the number of days' ringing from six to five, and say you have not tried this; and so on *toties quoties*. It is clear the argument, if pushed to its full extent, must result in that which is contrary to all reason and to all justice. The questions to be tried were, whether the plaintiff's right in his house was such as to entitle him to come for relief at all, and whether the ringing of the bells was in its nature, a nuisance at law. Both these questions have been tried; but the exact extent or *quantum* of injury or nuisance inflicted, need not be ascertained. Besides, the whole argument upon this ground is put an end to by an allegation in the bill, which the demurrer of course, admits to be true; "that the defendant threatens and intends, not only to continue tolling or ringing the last-mentioned bells every Sunday in the manner last aforesaid, but he also threatens and intends to ring peals of the said six bells, and also to toll and ring, on week days; and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house." Therefore, upon this demurrer, it is quite clear that the argument that the plaintiff has not established his right, at law, cannot be maintained.

NELSON v. MILLIGAN.

(Supreme Court of Illinois, 1894, 151 Ill. 462, 38 N. E. 239.)

WILKIN, C. J. This was a bill, by appellant against appellees in the Superior Court of Cook county, filed on the 31st of December, 1892, for injunction. . . .

The injury complained of by the bill, sought to be enjoined, is permitting dense smoke, dust and soot to be emitted from the chimneys of defendants' hotel, which is cast upon and into the doors and windows of complainant's dwelling house, to the injury of his carpets,

curtains, draperies, etc., and to the annoyance and discomfort of himself and family residing therein. . . .

While the decree finds that complainant was injured by smoke from the chimneys of the defendants, as alleged in the bill, it also finds that the hotel building can be operated without causing any dense smoke, by the use of proper fuel; that on certain occasions the manager caused certain kinds of fuel to be used, which produced no dense smoke or soot in appreciable quantities, but that, during the months of November and December, 1892, dense smoke frequently issued from the chimneys of said hotel building.

All, then, that can be said from the bill, answer, and findings of the decree, is that, from time to time, prior to the filing of the bill, through the negligence or wrongful act of the defendants, complainant was injured in the manner stated in his bill. The decree in effect finds that, while using "West Virginia coal," no appreciable dense smoke was emitted, and there is no conflict in the evidence as to the fact that defendants proposed using that quality of fuel, and had done so when it could be obtained.

While it is true that the consequences of their not being able to get, or unwillingness to use, the better and higher priced quality of coal, can not be visited upon complainant without compensation in damages, it by no means follows that a court of equity will make them liable to its penalties for contempt, if they should be compelled to use the inferior fuel temporarily to avoid abandoning their business. The remedy for such an injury is complete and adequate at law. There is no theory of this case, conceding all that is found in the decree, upon which it can be said an injury is shown which can not be fully ascertained and adequately compensated by damages in an action at law, or which, from its continuance or permanent mischief, will necessarily occasion constantly recurring grievances, which can not be otherwise prevented than by injunction, and therefore, upon the authorities cited above, no ground is shown for the exercise of equity jurisdiction. . . .

The evidence, then, in this record, favorably construed for the complainant, shows no more than that the defendants, in carrying on their lawful business, have temporarily been compelled to use, or have at most negligently used, a quality of fuel which produced dense smoke, to the injury of complainant. As before said, for such

an injury the remedy at law is complete and adequate. There is nothing in this record to justify the conclusion that there will be occasion to resort to such an action repeatedly. There is, therefore, no occasion for invoking the jurisdiction of a court of equity. This conclusion in no way conflicts with the view, that emitting dense smoke from chimneys may become both a public and private nuisance, nor that cases may not arise where such nuisances will be enjoined. No such case is presented by this record.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WHALEN v. UNION BAG & PAPER CO. .

(New York Court of Appeals, 1913, 208 N. Y. 1, 101 N. E. 805.)

WERNER, J. The plaintiff is a lower riparian owner upon Kayaderosseras creek in Saratoga county, and the defendant owns and operates on this stream a pulp mill a few miles above plaintiff's land. This mill represents an investment of more than a million dollars and gives employment to 400 or 500 operatives. It discharges into the waters of the creek large quantities of a liquid effluent containing sulphurous acid, lime sulphur, and waste material consisting of pulp wood, sawdust, slivers, knots, gums, resins and fibre. The pollution thus created, together with the discharge from other industries located along the stream and its principal tributary, has greatly diminished the purity of the water.

The plaintiff brought this action to restrain the defendant from continuing to pollute the stream. The trial court granted an injunction to take effect one year after the final affirmance of its decision upon appeal, and awarded damages at the rate of \$312 a year. The Appellate Division reversed the judgment of the Special Term upon the law and facts, unless the plaintiff should consent to a reduction of damages to the sum of \$100 a year, in which event the judgment as modified should be affirmed, and eliminated that part of the trial court's decree granting an injunction. The plaintiff thereupon stipulated for a reduction of damages, and then appealed to this court from the modified judgment. The facts found by the trial

court—which do not appear to have been disturbed by the Appellate Division—establish a clear case of wrongful pollution of the stream, and need not be set forth in detail.

The plaintiff is the owner of a farm of two hundred and fifty-five acres, and the trial court has found that its use and value have been injuriously affected by the pollution of the stream caused by the defendant. The defendant conducts a business in which it has invested a large sum of money and employs great numbers of the inhabitants of the locality. We have recently gone over the law applicable to cases of this character (*Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Sammons v. City of Gloversville*, 175 id. 346,) and it is unnecessary now to restate it. The majority of the learned court below reduced the damages suffered by the plaintiff to \$100 a year, and reversed that portion of the decree of the trial court which awarded an injunction. The setting aside of the injunction was apparently induced by a consideration of the great loss likely to be inflicted on the defendant by the granting of the injunction as compared with the small injury done to the plaintiff's land by that portion of the pollution which was regarded as attributable to the defendant. Such a balancing of injuries cannot be justified by the circumstances of this case. It is not safe to attempt to lay down any hard and fast rule for the guidance of courts of equity in determining when an injunction shall issue. As Judge Story said: "It is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrong." (2 Story's Eq. Juris. [10 ed.] § 959b).

One of the troublesome phases of this kind of litigation is the difficulty of deciding when an injunction shall issue in a case where the evidence clearly establishes an unlawful invasion of a plaintiff's rights, but his actual injury from the continuance of the alleged wrong will be small as compared with the great loss which will be caused by the issuance of the injunction. This appeal has been presented as though that question were involved in the case at bar, but we take a different view. Even as reduced at the appellate division, the damages to the plaintiff's farm amount to \$100 a year. It can hardly be said that this injury is unsubstantial, even if we should leave out of consideration the peculiarly noxious character of the pollution of which the plaintiff complains. The waste from the defendant's mill is very destructive both to vegetable and animal life and tends to deprive the

waters with which it is mixed of their purifying qualities. It should be borne in mind also that there is no claim on the part of the defendant that the nuisance may become less injurious in the future. Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich. It is always to be remembered in such cases that "denying the injunction puts the hardship on the party in whose favor the legal right exists instead of the wrongdoer." (Pomeroy's Eq. Juris. vol. 5, § 530.) In speaking of the injustice which sometimes results from the balancing of injuries between parties, the learned author from whom we have just quoted, sums up the discussion by saying: "The weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction." To the same effect is the decision in *Weston Paper Co. v. Pope* (155 Ind. 394.) "The fact that the appellant has expended a large sum of money in the construction of its plant and that it conducts business in a careful manner and without malice can make no difference in its rights to the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from and necessary for the free use of their land; and they were bound also to know the character of their proposed business, and to take notice of the size, course, and capacity of the stream, and to determine for themselves at their own peril whether they should be able to conduct their business upon a stream of the size and character of Brandywine creek without injury to their neighbors; and the magnitude of their investment and the freedom from malice furnish no reason why they should escape the consequences of their own folly." . . .

BLISS v. ANACONDA COPPER MINING CO.

(United States Circuit Court, 1909, 167 Fed. 342.)

HUNT, P. J. Fred J. Bliss, a resident and citizen of Idaho, instituted this suit on the 4th day of May, 1905, against the Anaconda Copper Mining Company and the Washoe Copper Company, Montana corporations, and prayed for a permanent injunction forever restraining and enjoining defendants from operating a certain smelting plant situated near the city of Anaconda, Mont., and from treating ores described as containing poisonous and deleterious substances, and for general relief. . . .

Finally, in the last analysis, when, in connection with the attitude of Mr. Bliss, direct and vicarious, we weigh the uncertainty of his proof as to the amount of past damages done to his land, or of future damages to be done to his pastures by the acts of these defendants, together with the fact that he has not resorted to a court of law to recover any damages at all, and balance these matters against the stern fact that, if defendants are enjoined as prayed for, they must either buy the lands of the farmers at their own prices, or sacrifice their property; that, if enjoined as prayed for, their smelter must close; that, if it does close, their business and great property will be practically ruined; that a major part of the sulphide copper ores of Butte cannot be treated elsewhere within this state; that thousands of defendants' employees will have to be discharged; that the cities of Anaconda and Butte will be injured irreparably by the general effect upon internal commerce and business of all kinds; that professional men, banks, business men, working people, hotels, stores, and railroads will be so vitally affected as to cause unprecedented depression in the most populous part of the state; that the county government of one county of the state may not be able to exist; that the farmers of the valleys adjacent to Butte and Anaconda will not have nearly as good markets as they have enjoyed; that the industry of smelting copper sulphide ores will be driven from the state; and that values of many kinds of property will either be practically destroyed or seriously affected—remembering, always, that the courts of law are open to Mr. Bliss, I hold that under the evidence, as he has submitted

his case, discretion, wisely, imperatively guided by the spirit of justice, does not demand that injunction, as prayed for, should issue.

It does not necessarily follow, however, that his bill should be dismissed. This has been a litigation of overmuch expense. Its consequences are of interest to many people, and, keeping in mind the essential fact that animal health is being affected, if there can be any reasonable preventive remedy applied by a court of equity, every larger consideration demands that it should be; that is to say, notwithstanding the denial of the writ, as prayed for, if a measure of relief less than that which complainant has proved he is entitled to can be awarded to him, he should have it by some form of judicial order. Equity, having jurisdiction of the parties and the subject-matter, will therefore retain the bill, in diligent effort to afford all the relief reasonably possible under its allegations. Where the defendant has a clear ultimate right to do the act sought to be enjoined upon certain possible conditions, the courts will endeavor to adjust their orders so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. *McElroy v. Kansas City*, (C. C.) 21 Fed. 257.

I am always deeply sensible, too, how especially important it is, in the practical preservation of the equality of the law, that, when a man of limited means seeks relief against a corporation or individual of very great wealth, his property rights must be protected with scrupulous care against threatened or continuing unlawful encroachments, without unnecessarily forcing him into litigation so expensive or protracted that it may mean impoverishment or denial of substantial justice. Let it not be understood that, in saying this, I mean to imply that defendants herein have assumed any unfair attitude toward Mr. Bliss or others in the Deer Lodge valley. On the contrary, as the case is submitted, it appears that they were ready to treat with him and other landowners, and were willing to buy his land, and consider claims of injury; but their advances were checked by Mr. Bliss' refusal to sell, and by the ultimatum of March 4, 1905, from the association. Nevertheless, the court will not peremptorily turn the complainant away, but will use its power, already invoked in this suit, to give him relief as may be reasonably possible, without destroying defendants' business; but, for lack of information, the court can now make no such specific order as will be just to both

sides. Accordingly, after a study of the evidence of Mr. Mathewson, superintendent of the Washoe smelter, I take it upon myself as a chancellor to say that I am not satisfied that the construction of additional arsenic furnaces will not help the situation, or that there may not be some system of spraying the smoke and cooling the gases which will aid in settling flue dust, or that a greater width and height to the chambers may not be effective aids, or that a further system of filters may not be devised, or that briquetting flue dust may not be of help, or that an arrangement of bags may not be made, or other means applied, perhaps discovered since this suit was instituted, which will materially reduce the quantities of escaping arsenic. I therefore think the more equitable course to pursue is to call for further evidence with respect to the subject of adopting other or additional means to prevent the release of arsenic, to the end that I may be more fully advised in the premises before making final disposition of the case. . . .

SECTION IV. DISTURBANCE OF PRIVATE EASEMENTS.

PARKER & EDGARTON v. FOOTE.

(Supreme Court of New York, 1838, 19 Wend. 309.)

This was an action on the case for stopping lights in a dwelling-house, tried at the Oneida circuit in April, 1836, before the Hon. Hiram Denio, then one of the circuit judges. . . .

Most of the cases on the subject we have been considering, relate to ways, commons, markets, water-courses, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit

are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. (*Chandler v. Thompson*, 3 Campb. 80. *Cross v. Lewis*, 2 Barn. & Cress, 686, per Bayley, J.) Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another under a claim of right to pass over, or to feed his cattle upon it; or divert the water from his mill, or throw it back upon his land or machinery; in these and the like cases, long continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no adverse user, nor indeed any use whatever of another's property; and no foundation is laid for indulging any presumption against the rightful owner. . . .

The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may lawfully have windows looking out upon the lands of his neighbor. (2 Barn. & Cres. 686; 3 id. 332.) The reason why he may lawfully have such windows, must be, because he does his neighbor no wrong; and indeed, so it is adjudged, as we have already seen; and yet somehow or other, by the exercise of a lawful right in his own land for 20 years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seized of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled. (2 Barn. & Cres. 686. 2 Carr. & Payne, 465; 5 id. 438.) Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall 20 or 50 feet high, as the case may be—not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done in one's own land, is cal-

culated to render a man odious. Indeed an attempt has been made to sustain an action for erecting such a wall. (*Mahan v. Brown*, 13 Wendell, 261).

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned with some qualification by an act of parliament. (Stat. 2 & 3 Will. 4, c. 71, § 3.) But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law. (3 Kent's Comm. 446, note [a].) Nor do I find that it has been adopted in any of the states. The case of *Story v. Odin* (12 Mass. R. 157), proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, from no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775 (Const. N. Y. art. 7, § 13.) There were two *nisi prius* decisions at an earlier day (*Lewis v. Price* in 1761, and *Dongal v. Wilson* in 1763), but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the K. B. (2 Saund. 175, note [2]). This was clearly a departure from the old law. (*Bury v. Pope*, Cro. Eliz. 118).

BRANDE v. GRACE.

(Supreme Court of Massachusetts, 1891, 154 Mass. 210, 31 N. E. 633.)

Bill in equity, filed in the Superior Court on August 30, 1890, against James J. Grace and the American Protective League, to prevent the defendants from altering a building. The case was heard by MASON, J., and reported for the determination of this court, and was as follows.

The plaintiffs composed the firm of Brande and Soule, dentists; and the defendant Grace was the lessee of premises numbered 181 Tremont Street, in Boston, which included a six-story building set

back from twelve to fourteen feet from the sidewalk of that street. The unoccupied land between the building and the street was included in his lease, and was used as a part of the sidewalk, but had never been dedicated to the public. On or about February 1, 1888, Grace executed a sublease, with a covenant therein for quiet enjoyment of a portion of the building, described as "the rooms numbered, 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with all the rights and privileges thereto belonging. . . . from the first day of March, A. D. 1888, during the following term of four years thence next ensuing, expiring February 29, A. D. 1892." These rooms included the front rooms on that story, and from them an uninterrupted outlook was to be had into the street. The plaintiffs, who were already in occupation of the rooms as tenants of Grace, continued thenceforward to occupy the rooms, and to do a profitable business in dentistry there, and allowed their signs attached to the outside face of the front wall to remain there. Subsequently Grace sublet the entire premises to the American Protective League for a term of years, which corporation proceeded to alter the building by taking down the original front wall thereof, and by extending its side walls to the street line and erecting a new front wall to the entire height of the building, so as to enclose the rooms leased and occupied by the plaintiffs, and to interpose another room between them and the street. This bill was then brought by the plaintiffs to prevent such alterations from being made, and a temporary injunction was issued to prevent the defendants from taking down so much of the original front wall as enclosed the second story of the building. . . .

ALLEN, J. The determination of this case depends upon the proper application of rules of law, which of themselves are simple. "The grant of anything carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it." *Salisbury v. Andrews*, 19 Pick. 250, 255. And in order to determine what is thus granted by implication, the existing circumstances, and the actual condition and situation of that which is granted, may be looked at. *Salisbury v. Andrews*, 19 Pick. 250, 255.

The premises leased to the plaintiffs were described as "the rooms numbered 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with

all the rights and privileges thereto belonging." These rooms included all the front rooms in the second story of the building. The building was set back twelve or fourteen feet from the line of the street, and the space between the building and the line of the street had been used as a part of the sidewalk, but never dedicated to the public. The rooms were therefore front rooms, from which the view of the street was unobstructed. The plaintiffs hired the rooms for business purposes. The alterations which the defendants were proceeding to make would have the effect to interpose another room between the leased rooms and the street, and the plaintiffs' rooms would no longer be the front rooms of the building.

Alterations of this character are inconsistent with the rights of the plaintiffs under their lease. It could not have been understood at the time the lease was given that a right to make such alterations was reserved. It is not like the case of the erection of a building, either by a stranger or by the lessor, upon an adjoining lot, which is adapted to have a separate building erected upon it. In this case the lessor, or those holding his title, seek to make such changes in the building itself which contains the leased rooms as will essentially change their character. The subject of the lease is so materially changed that the rooms will no longer answer to the description of them in the lease, when the condition and situation of the premises are also looked at. The lease carries with it an implication that the lessor should not thus proceed to impair the character and value of the leased premises. *Salisbury v. Andrews*, 128 Mass. 336. *Doyle v. Lord*, 64 N. Y. 432.

We do not regard this view of the rights of the parties as at all inconsistent with the decision in *Keats v. Hugo*, 115 Mass. 204, and other cases, which hold or intimate that the necessity must be pretty plain in order to warrant the implication of a grant. In this case it is plain that the alterations are inconsistent with the rights of the plaintiffs under their lease.

Under this state of things the defendants might properly have been enjoined from proceeding with their proposed alterations. But the learned justice before whom the case was heard in the Superior Court took a different view of the rights of the parties, relying, it is said, upon *Keats v. Hugo*, 115 Mass. 204; and accordingly the plaintiffs' prayer for an injunction was refused. The defendants thereupon pro-

ceeded with the work, until now it is completed, so far at least as the external structure of the building is concerned. The lease to the plaintiffs will expire on the last day of February next, and, if the defendants were now ordered to pull down their structure, they might then restore it. The rules under which mandatory injunctions have been issued for such a purpose should not be applied in a case like this. *Attorney General v. Algonquin Club*, 153 Mass. 447. It would cause an unnecessary destruction of property. In view of the early termination of the plaintiffs' lease, their remedy should now be confined to compensation in damages, to reimburse them for the injury which they have suffered.

Decree accordingly.

DANIEL v. FERGUSON.

(Supreme Court of Judicature, 1891, 2 Ch. 27.)

The plaintiff was the owner of long leases of three adjoining houses, 49, 51, and 53 Hereford Road, Bayswater. In September, 1890, the Defendant prepared to build upon a piece of ground adjoining the south side of No. 49 a large building to be called Hereford Mansions. The plaintiff had the plans inspected on his behalf, and came to the conclusion that the proposed erection would materially affect the access of light and air to his houses. After some correspondence, the plaintiff, on the 28th of November, 1890, issued his writ in this action for an injunction, and on Saturday the 29th, notice of motion for injunction for Friday, the 5th of December, was by leave of the court served on the defendant, along with the writ. The service was between twelve and one o'clock. At two o'clock the defendant turned on a large number of men, who went on building all through the night and until 2 P. M. on Sunday. On Monday they resumed work, and ran up the wall adjoining No. 49 to the height of about thirty-nine feet from the ground.

On Monday, the 1st of December, the plaintiff, being informed of the rapid progress of the building, applied *ex parte* for an *interim* injunction till Friday, which was granted. Notice of this was given to the defendant on the same day, and he ceased building.

When the motion of which notice had been given was brought on, the defendant adduced evidence with a view to showing that the plaintiff had no easement of light over the defendant's land. . . .

The evidence as to the effect of the building went to show that it would seriously affect the light of No. 49.

The motion of which notice had been given came on to be disposed of on the 19th of December, and Mr. Justice Stirling made an order restraining the defendant until judgment or further order from building on the land in question so as to darken the lights of the plaintiff's houses, and from permitting the wall or building which he had erected to remain on his land.

The defendant appealed. . . .

LINDLEY, L. J. I am of opinion that this appeal must be dismissed without dealing with the question to be decided at the trial whether the plaintiff has an easement of light. It appears to be a nice question whether there was not at one time such a unity of possession as would prevent the plaintiff's houses from acquiring the easement. The plaintiff makes out a case entitling him to an injunction to keep matters in *statu quo* till the trial. That being so, the defendant, upon receiving notice that an injunction is going to be applied for, sets a gang of men to work and runs up his wall to a height of thirty-nine feet before he receives notice that an injunction has been granted. It is right that buildings thus run up should be pulled down at once, without regard to what the result of the trial may be.

KAY, L. J. I am of the same opinion. The questions to be decided at the trial may be of some nicety; but this is not the time to decide them. After the defendant had received notice on Saturday that an injunction was going to be applied for, he set a large number of men to work, worked all night and through nearly the whole of Sunday and by Monday evening, at which time he received notice of an interim injunction, he had run up his wall to a height of thirty-nine feet. Whether he turns out at the trial to be right or wrong, a building which he has erected under such circumstances ought to be at once pulled down, on the ground that the erection of it was an attempt to anticipate the order of the court. To vary the order under appeal would hold out an encouragement to other people to hurry on their buildings in the hope that when they were once up the court might decline to order them to be pulled down. I think that this wall

ought to be pulled down now without regard to what the result of the trial may be. The appeal will therefore be dismissed.

KREHL, v. BURRELL.

(In Chancery, 1878, 7 Ch. D. 551.)

This was an action brought by the Plaintiff, as owner and occupier of a messuage or a public-house No. 27 Coleman Street, in the City of London, known as the "Three Tuns," with a restaurant and dining-room, to obtain an injunction to restrain the Defendant from erecting a building on the site of an adjoining court, called Windmill Court, over which the Plaintiff and his predecessors in title claimed an uninterrupted right of way to or from the said messuage for forty years. . . .

JESSEL, M. R. The plaintiff in this action was the owner of an inn or public-house, No. 37, Coleman Street, in the City of London, with which he and his predecessors in title had, and enjoyed for many years without interruption, a user of a way or passage, and he claimed to be entitled as of right to such user. The user was undoubted, and the right was never disputed until the purchase by the Defendant recently of the adjoining houses. The defendant threatened to obstruct the way, and the user of the passage or court, by erecting a large building. The Plaintiff gave notice to the Defendant that he was entitled to such way as of right, and on the Defendant persisting in his threats the Plaintiff brought an action, and issued a writ for an injunction on the 27th of April, 1876. Notwithstanding that the writ was issued, and in spite of the assertion by the Plaintiff of his rights, the Defendant, with full notice, and without any reasonable ground that I could discover at the trial of the action, and indeed without any ground at all, for none has been brought before me, insisted upon obstructing the way, and built over it a solid, and I am told, a large and expensive structure, which completely blocked it up. . . .

The question I have to decide is, whether the appeal to me by the Defendant to deprive the Plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is

true he has another way to his house by Coleman street; but it was obvious, when the facts were mentioned to me, that as regards the custom of the house it would be very seriously interfered with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the Court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice the right belonging to the Plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich Defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, "You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,"—of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the Lands Clauses Act, to compel people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavored to deprive his neighbor, the man with small possessions, of his property, with or without adequate compensation.

COBB v. SAXBY.

(Supreme Court of Judicature, 1914, 3 K. B. 822.)

Action tried by Rowlatt J. without a jury.

The plaintiff was the owner in fee simple and occupier of certain premises, No. 33, King street, Margate, consisting of a dwelling-house with a shop on the ground floor. The defendant was the leaseholder and occupier of a house and shop, No. 35, King street, next to the plaintiff's house, the side walls of the two buildings being in contact with each other. Both houses opened directly into the street, but the front of the defendant's house projected into the street for a distance of eighteen inches beyond the front of the plaintiff's house.

In 1910 the plaintiff caused to be affixed to the front of his house and at right angles thereto two boards sixteen inches wide, one above the other, which reached from a point eight inches above the pavement to a height of twenty-two feet at a distance varying from two to nine inches from that part of the defendant's side wall which projected beyond the front of the plaintiff's house. There were no windows or doors or other openings in the defendant's side wall.

The action was brought by the plaintiff for an injunction to restrain the defendant from placing his advertisements on the boards. The defendant by his defence admitted he had acted wrongfully in so doing, and gave an undertaking not to repeat the trespasses and paid 40s. into Court which was accepted by the plaintiff in satisfaction of his claim; and the only question at the trial was that raised by the defendant's counter-claim.

The defendant by his counter-claim alleged (*inter-alia*) that the plaintiff's act in placing the boards where they were was wrongful, and the defendant had thereby suffered damage in that the boards obstructed the access to and diminished the enjoyment of the defendant's premises, and prevented him from examining and repairing his wall and from advertising on it and from making a door in it.

The defendant claimed damages and an injunction. . . .

ROWLATT, J. . . . For the purpose of my judgment I will assume, though it has not been strictly proved, that the title to the subsoil of that part of the roadway which is in the corner formed by the pro-

jection of the defendant's wall is in the plaintiff as the owner of No. 33. The position taken up by the plaintiff is, as I understand it, that if the defendant were at any time to make a doorway in the projecting part of his wall, he (the plaintiff) would not insist on maintaining the boards in such a position that they would interfere with the defendant's right of egress from his premises, and, therefore, I do not propose to deal with the case on the footing that the plaintiff is threatening to obstruct the egress from any door on the defendant's premises. But the plaintiff does claim the right to maintain the boards in their present position with the result that the defendant is prevented from using the wall for the purpose of placing advertisements on it, and the plaintiff says that he will only take the boards down at such reasonable times as the defendant may require for the purpose of repairing the wall and after reasonable notice.

In my opinion the contentions raised by the defendant's counterclaim are well founded. It is said on his behalf that the existence of these boards in their present position constitutes an invasion of the private rights which the defendant possesses by reason of the contiguity of his premises to the public highway. It is well settled law that the owner of land adjoining a highway has the private right of passing from his premises on to the highway, and if that right is obstructed and he brings an action against the person causing the obstruction, he is not in the position of a member of the public who complains of an obstruction to the highway which especially affects him, but he is a person who has a cause of action by reason of the interference with or obstructions to his private right. Although no authority precisely in point has been cited, I am of opinion that the owner of a house adjoining a public highway has precisely the same rights, as regards the highway, with respect to the wall of his house as he has in the case of a door or other entrance leading from his house on to the highway. He has the right to do anything he likes to the wall, for example to display advertisements upon it, and if these rights are invaded or obstructed, he has, in my opinion, a good cause of action against the person causing the interference with his rights. Take the case of a wall of a house adjoining a highway which has a window in it which the owner of the houses uses for the display of his goods, or suppose the owner of the house places on the wall pictures or advertisements of goods which he has for sale, it is to his interest that the members of the public using the highway should be

able to look in at the window or to gaze at the advertisements on the wall, and if any one prevents the public from so doing the rights of the owner of the wall are invaded. It is to my mind unthinkable that, if a man were to hold a screen in front of a shop window and thus prevent the public from looking in, he should be allowed to justify his so doing on the ground that, because he was not preventing egress from the shop to the highway, he was not interfering with any right of the owner of the shop. In my opinion, the law does not in those circumstances leave the owner of the premises without a remedy.

For these reasons I am of opinion that on the facts of this case the defendant is entitled to judgment on his counter-claim.

SECTION V. OBSTRUCTION OF PUBLIC RIGHTS.

FESSLER v. TOWN OF UNION.

(New Jersey Court of Chancery, 1904, 67 N. J. Eq. 14, 56 Atl. 272.)

The object of this bill is to restrain a nuisance in the nature of a purpresture. . . .

The complainant is the owner of ten lots, each twenty-five feet by one hundred feet, and each facing on Franklin street, in the town of Union, in the county of Hudson. The rear of six of which lots, and also the rear of two other lots of the same size which do not face on Franklin street, she alleges bound upon a public square which was dedicated to the public by the owners of a tract of land which comprised the complainant's lots, and many others in the neighborhood, by the usual mode of laying the plot out in streets and lots, filing the same in the county clerk's office and selling and conveying lots by reference to the map. . . .

The nuisance of which she complains is the erection of a fire-bell tower on that square and within about thirty feet of her premises. The structure is composed of iron posts, beams and braces. . . .

PITNEY, V. C. I am of the opinion that the dedication in this case was for the purpose of use by the public as an open pleasure ground

—a ground with trees and a small lake, if the the latter was found desirable and practicable; that the dedication did not include the use of it for a public building, and that the defendant had no right under the original dedication to erect any building upon it. . . .

We come, then, to the question of the complainant's standing in this court.

The general rule is that any encroachment on a public highway or public square is an offense against the public, punishable by indictment only, and that one or more of the public cannot maintain an action at law or in equity therefor unless he is so situated as to be injured thereby in a manner and to an extent peculiar to himself as an individual as distinguished from himself as a member of the public at large.

The complainant is the owner of ten lots, comprising a boundary on the square in question of one hundred and fifty feet in the immediate neighborhood of the tower in question. It is within thirty feet of her house lot, and the existence in that place of the tower and the ringing of the bell in case of fire will, in my judgment, produce an effect injurious to the enjoyment of her property, different in a marked degree to that of the inhabitants generally of the town of Union, which is a closely built town of from fifteen thousand to twenty thousand inhabitants.

There may be a few other lot owners in the immediate vicinity who are interested in the same degree, or nearly so, as the complainant, and they may have the same standing as the complainant, but the fact that they have not joined in this suit, or brought a suit on their own account, cannot prejudice the rights of the complainant, if those rights are, as I suppose them to be, peculiar to her by reason of her vicinity to the square.

But, of course, if I am right in my conclusion that she has, by reason of her owning lands bounding on the square, a right in the nature of a private right, then she has a right in addition to her being a member of the public, which dispenses with the necessity of resorting to the doctrine of peculiar injury.

Next as to her right to maintain an action against a municipality.

No point was raised by counsel for the defendant that his client was entitled to any immunity from action if, in point of fact, its action was unwarranted by law; and no case was cited by counsel on either side bearing precisely on this point, nor have I been able to find any.

Moreover I find no case, in this state at least, where the municipal authorities have ever been charged with a breach of their trust in that behalf.

But I think, upon general principles, the complainant must have a right of equitable action, otherwise the inhabitants not especially interested in the existence of that square might unite and elect a common council which might be so far recreant to its duty and regardless of the rights of the landowners as to obliterate the square absolutely and devote it to business purposes. . . .

I think that the complainant is entitled to a decree against the municipality providing for the removal of the tower and of all its constituent parts, and that she is entitled to recover her costs besides a reasonable counsel fee, which I shall fix upon hearing parties.

THE STATE v. THE OHIO OIL COMPANY

(Supreme Court of Indiana, 1897, 150 Ind. 21, 49 N. E. 809.)

MCCABE, J. The State of Indiana, by her Attorney-General and the prosecuting attorney of the Madison Circuit Court, brought suit against the appellee, the Ohio Oil Company, seeking to enjoin it from wasting natural gas. . . .

The appellee contends that "the question of the exhaustion of the gas is certain according to the averments in both the injunction cases, and the question, therefore is, who shall be permitted to exhaust it." "The State contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company which is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business, but the waste and destruction of natural gas which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana, and the welfare and comfort of its citizens, is not only a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. Sections 2316-2318, Burns'

R. S. 1894 (Acts 1891, p. 55) ; section 7510, Burns' R. S. 1894 (Acts 1893, p. 300). Section 1 of the latter act provides: "That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles." The constitutionality of the latter act is assailed by the appellee. But the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in *Townsend v. State*, 147 Ind. 624, for every conceivable constitutional objection, and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act. . . .

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But appellee tries to excuse its conduct on the score that it cannot mine and utilize oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the store-house of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it can not draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use

his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: "It is my property, to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourself if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other states, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action. Hence, the circuit court erred in sustaining appellee's demurrer to the complaint. The judgment is reversed, and the cause remanded, with instructions to overrule said demurrer, and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

SECTION VI. PUBLIC NUISANCE.

EVERETT v. PASCHALL.

(Supreme Court of Washington, 1910, 61 Wash. 47, 111 Pac. 879.)

CHADWICK, J. The findings of the trial judge show that plaintiffs are the owners of, and reside upon, lot 14, block 19, Madison Park

addition to the city of Seattle, in King County; that their property is of the value of \$2,000. Defendant is the owner of the south half of lots 12 and 13, block 9, upon which a cottage is situated. An alleyway separates plaintiffs' lot from the fractional lots of the defendant. On November 29, 1909, defendant opened, and has since maintained in his cottage, a private sanitarium for the treatment and care of persons afflicted with tuberculosis. The sanitarium has a capacity for accommodating ten patients, and since opening, there have been from four to ten patients under treatment. . . .

The text of our decision has been aptly stated by counsel for appellant: "Can a tuberculosis hospital be maintained in a residential portion of a city, where its maintenance depreciates the value of contiguous property from thirty-three and one-third to fifty per cent, and where its existence detracts from the comfortable use of such residential property?" In the evolution of the law of nuisance, there has grown an element not clearly recognized at common law. Blackstone, 3 Com. 216, has defined a nuisance to be "anything that worketh hurt, inconvenience, or damage"; reducing the nuisances which affect a man's dwelling to three, (1) overhanging it; (2) stopping ancient lights, and (3) corrupting the air with smells. It will be seen that, within these definitions, the maintenance of a sanitarium conducted with due attention to sanitation is not a nuisance, for it creates no physical inconveniences whatever. But a new element in the law of nuisance has been developed, first by judicial decisions, and later, by declaratory statutes—that is, the comfortable enjoyment of one's property. It is written in the statutes of this state: "Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency . . . or in any way renders other persons insecure in life, or in the use of property." Rem. & Bal. Code, § 8309.

Respondent contends, and the court has found, that the property of respondent is not a nuisance *per se*, and that it is so conducted that it is not, and cannot be, a nuisance by reason of its use; that there is no real danger; that the fear or dread of the disease is, in the light of scientific investigation, unfounded, imaginary, and fanciful; and that the injury, if any, is *damnum absque injuria*. On the other hand, the appellants insist that the location of a sanitarium for the treat-

ment of a disease, of which there is a positive dread which science has so far failed to combat, so robs them of that pleasure in, and comfortable enjoyment of, their home as to make it an actionable nuisance under the statute; and furthermore, under the findings of the court, that the presence of the sanitarium in a district given over to residences, and which have depreciated property from thirty-three to fifty per cent, is such a deprivation of property as will warrant a decree in their favor under the maxim *sic utere tuo ut alienum non laedas*.

Waiving for the present the substantial pecuniary damage which the court found to exist, and addressing ourselves to the principle underlying the lower court's decree—that is, that the danger being only in the apprehension of it, a fear unfounded and unsustained by science, a demon of the imagination—the courts will take no account of it; if dread of the disease and fear induced by the proximity of the sanitarium, in fact, disturb the comfortable enjoyment of the property of the appellants, we question our right to say that the fear is unfounded or unreasonable, when it is shared by the whole public to such an extent that property values are diminished. The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind. That fear is real in the sense indicated, and is the most essential human of all emotions, there can be no doubt. Mr. Fernande Mazade, has addressed his inquiries to this subject, and has but recently given his views, as well as the opinions of others, in the *Paris Revue. Current Literature*, Vol. 49, No. 3, p. 290 (Sept. 1910). The opinions collected are worth noticing. Alfred Capus, the psychological playwright, says: "Fear consists in capitulating to the instinct of self-preservation." M. Frederick Passy, of the Institute, "The bravest of men have known what fear is." M. Sicard, a professor of the Faculty of Medicine, considers fear or courage to be the result of temperament, training, and thought and which can be partially eradicated by reasoning and education, but never to be overcome in its most acute form, namely, the instinct of self-preservation. The conclusion of the editor is that, "it is far from being unanimously admitted that fear is a ridiculous malady, or one of which one need be ashamed in ordinary circumstances."

Comfortable enjoyment means mental quiet as well as physical comfort. In *Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215, under conditions which "greatly disturb the comfort and nerves and sleep of the inmates of complainants' home, and she and her family were greatly annoyed and distressed in mind," an injunction was sustained against the hospital as destructive to the peace, quiet, and comfort of the complainant. What "comfortable enjoyment" may be, must be determined by reference to the substantive word "comfort." This word has not been specifically defined in connection with nuisance cases. In *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654, Chancellor Zabriskie says: "No precise definition can be given; each case has to be judged by itself;" but in *Forman v. Whitney*, 2 Keyes (N. Y.) 165, Webster's definition is adopted: "It implies some degree of positive animation of the spirits, or some pleasurable sensations derived from happy and agreeable prospects;" the court adding: "The word embraces whatever is requisite to give security from want, and furnish reasonable physical, mental and spiritual enjoyment."

Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measurable, or subsisting. But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense. Each case must be judged by itself. *Joyce, Nuisance*, 19. Regard should be had for the notions of comfort and conveniences entertained by persons generally of ordinary tastes and susceptibilities. *Columbus Gas & Coke Co. v. Freeland*, 12 Ohio St. 392; *Barnes v. Hathorn*, 54 Me. 124. The nuisance and discomfort must affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment. *Joyce, Nuisance*, § 20. The theories and dogmas of scientific men, though provable by scientific reference cannot be held to be controlling unless shared by the people generally. In *Grover v. Zook*, 44 Wash. 494, 87 Pac. 638, this court said: "That pulmonary tuberculosis is both contagious and hereditary, as these terms are understood (although not in a strictly technical and professional sense), as well as infectious admits of little, if any, doubt."

This principle applies with peculiar force in this case, for aside from the general dread of the disease, as found by the court, it is

also shown that the security of the public depends upon proper precautions and sanitation, which may at any time be relaxed by incautious nurses or careless or ignorant patients.

Furthermore, the court found that the bacilli of the disease may be carried by house flies. Thus, every house fly that drones a summer afternoon in the drawing room or nursery is a constant reminder to plaintiffs of their neighbor, tending to disquiet the mind and render the enjoyment of their home uncomfortable.

The only case we find holding that fear alone will not support a decree in this class of cases is *Anonymous*, 3 Atk. 750, where Lord Hardwicke said: "And the fears of mankind, though they may be reasonable ones, will not create a nuisance." Our statute modifies, if indeed it was not designed to change this rule. Under the facts, we cannot say that the dread which is the disquieting element upon which plaintiffs' complaint is made to rest, is unreal, imaginary, or fanciful. In so doing, we are not violating the settled principles of the law, but affirming them. We conceive the case of *Stotler v. Rochelle* (Kan.), 109 Pac. 788, to be directly in point. There we find the same contentions made as here. The question was, whether the fear of cancer was sustained in the light of medical authority. The court said:

"In the present state of accurate knowledge on the subject it is quite within bounds to say that, whether or not there is actual danger of the transmission of the disease under the conditions stated, the fear of it is not entirely unreasonable."

The unusual feature of that case, in that judicial notice is taken of the fact that fear may be urged as a ground for injunctive relief, challenged the interest of the Hon. John D. Lawson, the learned editor of the *American Law Review*. He takes no issue with the rule. He says:

"A hospital, said the court, is not a nuisance *per se*, or even *prima facie*, but it may be so located and conducted as to be a nuisance to people living close to it. The question was not whether the establishment of the hospital would place the occupants of the adjacent dwellings in actual danger of infection, but whether they would have reasonable ground to fear such a result and whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property would not be materially interfered with by the bringing together of a considerable number of cancer patients in this place. However

carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities. The court concluded that upon these considerations the injunction was rightfully granted. The plaintiff, as the owner and occupant of adjacent property, had such a peculiar interest in the relief sought as to enable him to maintain the action." Vol. 44, *American Law Review*, No. 5, p. 759.

In the case of *Baltimore v. Fairfield Imp. Co.* 87 Md. 352, 39 Atl. 1081, 67 Am. St. 344, 40 L. R. A. 494, an injunction against placing a leper in a residence neighborhood for care and restraint was justified upon the ground that the disease produced a terror and dread in the minds of the ordinary individual. In that case, the court said:

"Leprosy is and has always been, universally regarded with horror and loathing. . . . The horror of its contagion is as deep-seated today as it was more than two thousand years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries cannot in this day be shaken or dispelled by mere scientific asseveration or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious; but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located."

In *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. 566, a temporary restraining order was granted against the maintenance of a tuberculosis hospital, notwithstanding evidence was introduced, as in this case, tending to show that the establishment of such a hospital, if properly maintained and conducted, would not be a menace to the health of the community, but in fact a benefit. We have no cases in this state directly in point, yet a case not without bearing is that of *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067. Judge Rudkin, delivering the opinion of the court said:

1 Eq.—20.

"The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities, if located within two hundred feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution in a residential portion of a city, would practically destroy the value of all property within its immediate vicinity for residence purposes."

We therefore conclude that the lower court erred in denying an injunction. The case is remanded with instructions to enter a decree upon the finding in favor of appellant.

COMMONWEALTH v. McGOVERN.

(Court of Appeals of Kentucky, 1903, 116 Ky. 212, 75 S. W. 261.)

Opinion of the court by Judge Settle—Reversing.

This equitable action was instituted in the Jefferson circuit court, common pleas division, by the appellant, the Commonwealth of Kentucky, on relation of the Attorney General, against the appellees, Terry McGovern and others, to prevent the holding of a prize fight advertised to take place on the 22nd day of September, 1902, in the Auditorium, a large theater situated in the city of Louisville. Terry McGovern and Young Corbett were to be the combatants, and their managers and the owners of the Auditorium were made parties to the action. . .

Is the use of land or a building for the maintenance of prize-fighting a public nuisance? In Wood on Nuisances (3rd Ed.), section 68, the author says: "A public exhibition of any kind that tends to the corruption of morals, or to disturbance of the peace or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society." That a prize-fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt; and, if so, the use of a theater for prize-fighting is such a nuisance. Therefore the Legislatures of many of the States have

enacted laws for their suppression, realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end; and the courts have been uniform in upholding the statutes thus enacted. Thus, in *Sullivan v. State*, 67 Miss. 352, 7 South. 276, the Supreme Court of Mississippi said: "We think, however, that the evil sought to be protected against by the statute is the debasing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators."

Such a meeting as would have been held in the Auditorium, in Louisville, to witness the prize-fight between McGovern and Corbett, if that fight had occurred, would doubtless have attracted some of the better and law-abiding class of citizens, curious to see such a spectacle as a prize-fight; but for every such reputable citizen thus attending, there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly could easily be led into a riot, or other unlawful disturbance of the public peace. In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and State, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprise.

We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the process of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize-fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor and manager of the Auditorium theater from permitting the holding of a prize-fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety. We think this

exercise of power by the court can not be questioned, not because any new powers were conferred upon it by the statute against prize-fighting, but because such jurisdiction exists in courts of equity, and has practically always so existed, and, further, because its exercise was required in this instance by the exigencies of the case and the express language of the statute, which commanded the court to use all the power with which he was vested, to the end that the nuisance might be suppressed.

As already suggested, not the least of the evils connected with the holding of the prize-fight would be the presence of the immense crowds of lawless and turbulent men from all quarters. An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial officers, after the meeting of the audience at the place of the combat, or in the act of assembling; for, although every person who attends a prize-fight by that act violates the law, it would be impossible for the officers of the law to arrest any considerable number of them under such circumstances.

We do not regard this case as analogous to that of *Neaf v. Palmer*, 103 Ky., 496, 20 R., 176, 45 S. W., 506. In the latter case the action was brought by several property owners to enjoin the maintenance of a bawdy house upon the property of another. In passing upon the questions involved, this court said, in part: "It is not alleged that there are offensive sights or sounds about the obnoxious premises, but only that the property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential. It seems to us, under these circumstances, criminal courts had best be left to enforce the criminal laws. They are confessedly adequate for the purpose of suppressing such evils."

There was nothing in the case, *supra*, to indicate that the bawdy house complained of could not be suppressed by the ordinary methods appertaining to the criminal court, and, the damages resulting to the plaintiff's property from the existence of the bawdy house being wholly consequential and speculative, it would, of course, have been improper in that case to employ the writ of injunction in aid of the mere property rights of the individual. But in the case at bar the complainant is the State,—the sovereign—which is seeking by a writ

of injunction to prevent a great evil, affecting the people of the city of Louisville, and the entire State as well, and which threatens irreparable injury to the public morals because of its cruelty, inhumanity, and debasing associations, and danger to the public safety because of its bringing together the lawless and turbulent elements of society from all quarters. Upon such a state of facts, and with the commands of the statute directing him to employ all his powers to avert the threatened evil, it was, in our opinion, no stretch of authority for the chancellor to employ the aid of the writ of injunction in such an emergency, to the extent, at least, of preventing the use of real property for the holding of the prize-fight. Nor do we think that the right of the chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration. . . .

GEORGIA v. TENNESSEE COPPER CO.

(United States Supreme Court, 1906, 206 U. S. 230.)

HOLMES, J. This is a bill in equity filed in this court by the State of Georgia, in pursuance of a resolution of the legislature and by direction of the Governor of the State, to enjoin the defendant Copper Companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory. It alleges that in consequence of such a discharge a wholesale destruction of forests, orchards and crops is going on, and other injuries are done and threatened in five counties of the State. It alleges also a vain application to the State of Tennessee for relief. A preliminary injunction was denied, but, as there was ground to fear that great and irreparable damage might be done, an early day was fixed for the final hearing and the parties were given leave, if so minded, to try the case on affidavits. This has been done without objection, and, although the method would be unsatisfactory if our decision turned on any nice question of fact, in the view that we take, we think it unlikely that either party has suffered harm.

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gulying of its roads.

The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U. S. 496, 520, 521. But it is plain that some demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisance impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U. S. 208, 241.

Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity

of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxid which becomes sulphurous acid by its mixture with the air. It hardly is denied and cannot be denied with success that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute. Without any attempt to go into details immaterial to this suit, it is proper to add that we are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri v. Illinois*, 200 U. S. 496. Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

It is argued that the State has been guilty of laches. We deem it unnecessary to consider how far such a defense would be available in a suit of this sort, since, in our opinion, due diligence has been shown. The conditions have been different until recent years. After the evil had grown greater in 1904 the State brought a bill in this court. The defendants, however, already were abandoning the

old method of roasting ore in open heaps and it was hoped that the change would stop the trouble. They were ready to agree not to return to that method, and upon such an agreement being made the bill was dismissed without prejudice. But the plaintiff now finds, or thinks that it finds, that the tall chimneys in present use cause the poisonous gases to be carried to greater distances than ever before and that the evil has not been helped.

If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next.

Injunction to issue.

MR. JUSTICE HARLAN, concurring. The State of Georgia, is, in my opinion, entitled to the general relief sought by its bill, and, therefore, I concur in the result. With some things, however, contained in the opinion, or to be implied from its language, I do not concur. When the Constitution gave this court original jurisdiction in cases "in which a State shall be a party," it was not intended, I think, to authorize the court to apply in its behalf, any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties. If this was a suit between private parties, and if under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a State possessing some powers of sovereignty. Georgia is entitled to the relief sought, not because it is a State, but because it is a party which has established its right to such relief by proof. The opinion, if I do not mistake its scope, proceeds largely upon the ground that this court, sitting in this case as a court of equity, owes some special duty to Georgia as a State, although it is a party, while under the same facts, it would not owe any such duty to the plaintiff, if an individual.

WESSON v. WASHBURN IRON CO.

(Supreme Court of Massachusetts, 1866, 95 Mass. 95.)

At the trial in this court, before Colt, J., the plaintiff introduced evidence tending to show that she had an estate for life in two dwelling-houses adjacent to premises used and occupied by the defendants for a rolling mill for the manufacture of railroad iron; that during the period complained of great quantities of smoke, cinders and dust came constantly from the defendants' works into said houses, to an extent, when the wind was east, enough to suffocate persons, making the houses black inside and out, covering the bed clothes and tablecloths with dust, and making the houses uncomfortable and unfit for habitation; that the defendants kept constantly in operation, by night and day, a trip-hammer capable of striking a blow of from seventy-five to one hundred tons, the effect of which was to jar the house so as to cause the plastering to crack and fall down repeatedly, so that no clock could run in one of the houses; that one of the houses had formerly been used as a tavern, but its use as such had been discontinued since the use of the trip-hammer, except that guests were occasionally received, who, after going to bed, had frequently come down late at night and gone to another hotel. . . .

The plaintiff requested the court to instruct the jury that if her dwelling-house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust and gas from the defendants' works, it was no defence to the action that many other houses in the neighborhood were affected in a similar way. But the judge declined so to rule, and instructed the jury, in accordance with the request of the defendants, that the plaintiff could not maintain this action if it appeared that the damage which the plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood. . . .

BIGELOW, C. J. . . . There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in

his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own reports. *Stetson v. Faxon*, 19 Pick. 147. *Thayer v. Boston*, 19 Pick. 511, 514. . . .

But it will be found that, in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace or comfort in their dwellings is impaired by the carrying on offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience and injury to persons and property thereby occasioned. Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstruct-

ed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree but in kind from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offence is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Now would such a doctrine be consistent with sound principles. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that in effect a wrongdoer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution,

unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. . . .

SECTION VII. COMMON LAW COPYRIGHT—STATUTORY MONOPOLIES.

HASKINS v. RYAN.

(New Jersey Court of Chancery, 1906, 71 N. J. Eq. 575, 64 Atl. 436.)

STEVENS, V. C. To the bill in this case a general demurrer is pleaded. The bill alleges, in substance, that during the years 1898 and 1899, 1900 and 1901, the complainant devoted a large part of his time to the study of industrial conditions connected with the output of pig lead in the United States, and had conceived the plan of uniting the outstanding lead interests, which had not already become a part of the National Lead Company, into one company, and had either procured options thereon or had opened negotiations for their purchase; that in the spring of 1891 "he had crystallized and formulated a complete plan for the combination of the white lead industries in the United States not already in the National Lead Company; that he laid such plans before the defendant, a capitalist; that he sought his co-operation and aid, and himself agreed to contribute, if necessary, as much as \$200,000 if the defendant would join him therein, and also contribute enough to carry the enterprise through."

The bill alleges further that defendant, to quote from the bill, "expressed a willingness to join your orator therein, provided an examination of the plan and papers by the attorneys, and experts of said

Ryan (the defendant) confirmed the statements of your orator made to him."

The bill then alleges that the complainant submitted the plan to Ryan's attorney, and was subsequently told by him that he had submitted it to Ryan, and had endorsed it "as comprehensive, feasible and attractive;" that through the efforts of Ryan's agents, options had been obtained upon most, if not all, of the properties upon which the complainant had options, that on January 20th, 1903, the United Lead Company was organized as a corporation under the laws of New Jersey, and, under the direction and control of Ryan, proceeded to acquire, and now owns, the interests in nearly all the companies, firms and individuals named in complainant's plan, and is capitalized with a capital stock of \$15,000,000 and has issued bonds for \$17,000,000; that in the formation and exploitation of this company, the defendant, Ryan, "has made an enormous profit, the amount of which is unknown to complainant," and that a combination substantially as planned by complainant has taken place, or is about to take place, with the result of great profits to said Ryan.

The bill then charges that Ryan's act of availing himself of the information complainant has collected and has only disclosed to Ryan "upon the agreement and understanding on the part of the said Ryan that he would join your orator in the said scheme and share with him in the profits arising therefrom is contrary to equity," but I do not understand that by this general charge it is intended to allege any other understanding or agreement than that contained in the stating part of the bill, viz., that Ryan had expressed a willingness to join complainant in his project, provided an examination of it by Ryan's attorneys and experts should confirm complainant's statements. The bill asks for a discovery and account of Ryan's profits and a decree that complainant is entitled to a share of them. Ryan is the sole defendant.

It is perfectly plain that no recovery can be had in this case on the basis of a completed agreement broken by Ryan. The plan, a copy of which is appended to the bill, contemplates the raising of \$15,000,000 for the purpose of acquiring the properties of the various concerns, twenty-two in number, other than that of the National Lead Company. The raising of a fund with which to purchase these properties was of the essence of the plan, but complainant had not bound

himself to contribute any definite sum, and Ryan had not bound himself to contribute anything. Even if, without direct averment, we should infer that an examination of the plan and papers had been made by Ryan's experts, and that such examination confirmed complainant's statements to Ryan, nothing more is shown than that Ryan agreed to join in the plan—that is, agreed to enter into a definite and explicit agreement on the subject. But nothing is better settled than that equity will not compel the specific performance of an agreement to make an agreement. *Lane v. Calvary Church*, 59 N. J. Eq. (14 Dick.) 413; affirmed on appeal.

An account on the basis of a completed agreement is therefore quite out of the question.

As I understand the complainant's argument, he does not rest his case on any such basis. His contention is this: The plan is my property. The defendant has appropriated it to his own use. I claim an account of the profits arising from its appropriation.

If in point of fact the plan has been wrongfully taken or appropriated, the remedy, if any, would appear to be an action on the case for damages, the amount being its fair value. But the plaintiff does not, and in this court could not, demand damages. He asks for a discovery and an account of profits.

The fact that he has not been able to cite any precedent for the claim he makes is not, of itself, conclusive if he can bring himself within the principle upon which an account is given.

The complainant has undoubtedly the right to claim protection in this court for his manuscript. It would seem that, without any reference to whether the plan is or is not open to the objection that it seeks to create a monopoly (*Kerr, Inj.* 186; *Oliver v. Oliver*, 11 C. B. (N. S.) 139), he would have the right to restrain its publication or to prevent its use; and in the case of an author the law does more than protect the manuscript regarded as a material thing of ink and paper. The combination of words of which it is composed (whether written down, or acted or sung before an audience admitted on payment of a fee) is also protected, and publication is restrained even if the manuscript be destroyed and an attempt be made to reproduce it from a copy rightfully in the possession of another, or even from memory. The work is protected indefinitely, before publication, by the common law (*Aronson v. Baker*, 43 N. J. Eq. (16 Stew.) 366; *New Jersey*

State Dental Association v. Dentacura Company, 57 N. J. Eq. (12 Dick.) 594; 58 N. J. Eq. (13 Dick.) 582), and for a limited time, after publication, by the statutory law of copyright. The law has never attempted to go beyond this and to enjoin, for the benefit of the author, after publication, the use of the ideas contained in his work.

In the case of secret processes of manufacturing, the law does, to a certain extent, enjoin the use of ideas. It would, of course, on the same principle on which it affords protection to the unpublished manuscript in the hands of the author, enjoin the publication or exhibition of the paper containing the formula; but it does more. In enjoining the use of the formula it restrains the wrong-doer from putting the idea formulated to practical account. *Stone v. Grasselli Company*, 65 N. J. Eq. (20 Dick.) 756. The protection ends when the secret becomes known. In the case of patent rights the statute goes still further. It affords protection for a limited period to a certain class of ideas, known as useful inventions, after the inventor has published them to the world, and because he has so published them. The valuable right here protected is not, as in the case of copyright, the manuscript or writing regarded as a peculiar combination of words or figures, but the idea or conception to which those words or figures give rise, so far as that idea or conception may admit of material embodiment. If the idea contained in the patented device of A suggests to the mind of B another idea, which would not have arisen in the mind of B but for the stimulus of the prior idea, A can claim no property in that, and yet B has mentally appropriated A's idea and made it the basis of his own, and I do not suppose that it has ever been contended that the entire public are not at liberty to subject A's idea to such investigation and discussion as it may desire. The wrong does not commence until the attempt is made to make or dispose of its material embodiment.

I now come to the precise question here involved. It is this: Has the complainant a property right in the scheme or idea to be found in his plan as contradistinguished from the property right which he has in his manuscript, regarded as a combination of words and figures, a thing of ink and paper?

A right is defined to be that interest which a person actually has in any subject of property, entitling him to hold or convey it at pleasure. But that can hardly be styled property over which there is

not some sort of dominion. Now, as I have already said, the combination of words and figures contained in complainant's plan belongs to him absolutely. Its publication or reproduction or exhibition in any form may be enjoined. But the idea contained in the plan differs from the ideas to which I have already called attention in this important respect: It involves the voluntary action and co-operation of many different men. When I say voluntary action, I mean action not restrained by contract, for the allegation that complainant had "options" is altogether too vague to warrant an inference that they are still subsisting, or that complainant had the means of availing himself of them without the aid of outside capital. Besides, the allegation is not that he has procured options on all the properties which it was proposed to combine, but that he either had options on them or had "opened negotiations for their purchase." The means of carrying out the plan; of giving effect to the idea lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called property. It lacks that dominion—that capability of being applied by its originator to his own use—which is the essential characteristic of property. It differs fundamentally from the secret process of patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now, it has never, in the absence of contract or statute, been held, so far as I am aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in *Jeffreys v. Boosey*, 4 H. L. Cas. 965: "*Volat irrevocabile verbum*, whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over it. . . . He has produced the thought and given it utterance, and *eo instanti* it escapes his grasp."

Justice Yates, in his dissenting opinion in the great case of *Millar v. Taylor*, 4 Burr. 2303, 2366 (an opinion which was afterwards concurred in by the house of lords), said: "Where are the *indicia* or distinguishing marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas so as to call himself the proprietor of them? They have no earmarks upon them." A case much like the

present is that of *Bristol v. Equitable Assurance Society of New York*, 5 N. Y. Sup 131; 132 N. Y. 264. There the complainant confidentially disclosed to the president of a life insurance company a system of soliciting life insurance devised by him. It was alleged that the company, after the disclosure, used the plan without complainant's consent. On demurrer, it was held that the plaintiff could not recover for the alleged use.

I am therefore of opinion that complainant has no property right in his plan regarded as an idea. Having no property right he has no right to an account.

But if a court of equity cannot treat complainant's idea as property, it is also incapable of giving him the remedy of account on another ground. The charge of the bill is that Ryan should account for complainant's share of any profits reaped by him from, or in connection with, the promotion and exploitation of the United Lead Company. Now, what profits could the defendant reap therefrom? The suggestion is that he might reap the profits of a promoter. A promoter may sometimes get shares not issued for money or property purchased. Such shares, viewed from a legal standpoint, are not of much value. But he may also get, by contract, fully-paid shares. It is presumably of such shares that the complainant desires an account. Now, on what basis could there be an equitable division of such shares? The complainant charges that it was part of his plan, personally, to contribute up to \$200,000 if necessary. He has, in fact, contributed nothing. The plan contemplated the raising of \$15,000,000. Ryan's interest in the company would depend in part upon the extent to which he had himself contributed, in part upon other considerations having no relation to complainant. This being so, it would seem to be utterly impossible, on any recognized basis of apportionment, to take from Ryan a part of his shares and give them to complainant. Complainant no doubt expected to secure shares, partly in return for the money to be put in by him and for the services to be performed by him, and partly for the prior work done in formulating the scheme. How much his collaborators in the undertaking, had they taken him in, would have allowed him for what he had done or would do is altogether conjectural. It would naturally have been a matter of express contract. I am quite unable to see how a court of equity could make him an allowance by way of account of profits, based

upon a condition of affairs wholly unanticipated and wholly unprovided for. Manifestly the only way of compensating him on any rational basis would be to ascertain what his plan was reasonably worth, and then to give him damages. This, of course, would presuppose a property right in the plan. Conceding such right, the damages, if recoverable at all, would be recoverable in a court of law in an action on the case, and not in equity.

I think the complainant's bill should be dismissed.

WHEATON v. PETERS.

(United States Supreme Court, 1834, 8 Peters 591.)

McLEAN, J. . . . "The complainants charge that the defendants have lately published and sold, or caused to be sold, a volume called 'Condensed Reports of Cases in the Supreme Court of the United States,' containing the whole series of the decisions of the court from its organization to the commencement of Peter's Reports at January term, 1827. That this volume contains, without any material abbreviation or alteration, all the reports of cases in the said first volume of Wheaton's Reports, and that the publication and sale thereof is a direct violation of the complainant's rights, and an injunction, etc., is prayed. . . .

The complainants assert their right on two grounds.

First, under the common law.

Secondly, under the acts of congress.

And they insist, in the first place, that an author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication; and to recover damages for its injury, by an action on the case, and to the protection of a court of equity. . . .

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.

The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.

It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labor of another, as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general. . . .

It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right. . . .

BETTS v. DE VITRE.

(In Chancery, 1864, 34 L. J. Ch. 289.)

In this case a bill had been filed, by William Betts, against "Wims-hurst's Patent Metal Foil and Sheet Metal Company (Limited)," and the directors and managers of the company, by which it was alleged that the defendants were infringing certain letters patent that had been taken out by the plaintiff, and that by reason of the infringement of the plaintiff's letters patent the plaintiff had sustained and was sustaining a great loss and injury, and had been and still was thereby deprived of large gains and profits which he would otherwise have made and obtained by working his patent. . . .

The plaintiff asked for damages and that the decree should direct an account of all profits of which the plaintiff had been deprived by reason of such infringement of his patent, as the profits made by the defendants could be no measure of the damages inflicted on the plaintiff. The plaintiff had not been in the habit of granting licenses, but had worked the patent himself. His Honour desired to hear the arguments of counsel on the point; and the case now came on to be heard on this question. . . .

WOOD, V. C. I confess it appears to me that, if the damages are to be assessed, it would be proper to take the identical course that was taken in *Hills v. Evans*, for this reason, that damages of this description, namely, damages for the infringement of a patent where there has been no license granted at any time for the use of that patent, can only be ascertained on those very vague and guess-like data which it appears juries have been obliged to act upon in ascertaining what the actual loss has been that has occurred to a patentee by the user by some wrong-doer of his patent right. [His Honour then commented at some length on the practice at law with regard to the assessment of damages in patent cases, and continued]—The difficulty, one sees, must be very great where there are no licenses existing. Where there are licenses existing, the difficulty would be next to nothing, because you would simply ascertain the amount sold, and fix the wrongdoer with that amount.

As regards the jurisdiction of the court, I do not entertain any doubt that, since the passing of the act of 1858, the court has jurisdiction; because the act of 1858 was passed for the express purpose of enabling this court to render complete justice, without sending the parties to another tribunal, leaving it open, however, to the court either to take the course of assessing damages, or to leave it to a court of law, it being felt, no doubt, that in many cases a jury would be the more proper tribunal. Under the act of 1862 it is equally proper (if one may say so), when it is only a question of what is the legal conclusion to be come to upon such facts as may be before the court to say the court is not authorized any longer to avail itself of the assistance of a court of law, but is bound to determine all the points of law, because the court is competent to decide such points without the assistance of another tribunal. As the case stood before the act of 1858, no doubt the remedy was simply that which Mr. Rolt has described. You obtained an injunction and an account of profits, and if any one came here for relief, that was the only relief given. This court never granted damages, and before the act of 1858, I apprehend, could never grant damages in respect of the infringement of a patent right. After the passing of this act of 1858, which enacted by the 2nd section, that in all cases seeking for an injunction against the commission or continuance of any wrongful act, the court may award damages to the party injured, either in addition to or in substitution for the injunction. The exact course was followed by the Lord Chancellor, in a case of obstruction to lights; and though it is quite true that in the case of interference with ancient lights there was not the specific remedy, which the court has here provided, of taking an account of profits, yet when you find that the legislature, in 1858, has said that in all these cases for injunction against wrongful acts, you shall have the power of granting damages, it does not appear to me to exclude the case where the court had the power of giving some other form of remedy if it thought fit. Therefore if a case came before me, in which there was a simple and plain case, namely, a case of licenses having been granted, and a fixed and definite royalty, so that the accounts would be a matter of the utmost simplicity, I should feel that the court was doing that which was plainly not within the view of the statute if it sent the parties to law to ascertain that which it had the means in its own hands of ascertaining under the

2nd section of the act. But in this case, I see the greatest imaginable difficulty in arriving at these damages. Mr. Betts is content to leave it to the court to say what the principle should be on which the court should proceed; but I have not heard that the defendants are willing to do anything of the kind, and one sees the extreme difficulty that might arise in a case of this kind, and the best way of pointing out that difficulty is, that the cases are extremely few, even at law, of ascertaining damages; the case has been generally a trial of the patent right, and when that has been determined the parties have settled the matter as they best could.

I think the proper course is to give the plaintiff an injunction, with the usual account of profits, and if he chooses to waive that account, then let him be at liberty to proceed at law for damages. I am following the direct precedent of the Lord Chancellor in *Hills v. Evans*, which was decided after the passing of the act, and, as far as I can see on the same ground, namely, the extreme difficulty the court has in seeing its way to assess damages. . . .

CONTINENTAL PAPER BAG CO. v. EASTERN PAPER
BAG CO.

(United States Circuit Court of Appeals, 1906, 150 Fed. 741.)

LOWELL, C. J. This is a bill in equity to restrain the infringement of letters patent No. 558,969, issued to Liddell for an improvement in paper bag machines. . . .

The machine of the patent in suit is mechanically operative, as was shown experimentally for the purposes of this suit, but it has not been put into commercial use. No reason for the nonuser appears in the evidence, so far as we can discover. The defendant's machine has been an assured commercial success for some years. It was suggested at the oral argument that an unused patent is not entitled to the protection given by the extraordinary remedy of an injunction. This contention was not made in the defendant's printed brief. While this question has not been directly passed upon, so far as we are informed, in any considered decision of the Supreme Court, yet the weight of authority is in favor of the complainant. *Fuller v. Berger*, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381. . . .

As we find the claims in suit to be valid and to have been infringed by the defendant, the complainant is entitled to an injunction, and the decree of the Circuit Court must be affirmed. . . .

ALDRICH, D. J. (dissenting). I agree to the conclusion that the patent in suit was infringed, but, notwithstanding infringement, I contend that injunction relief should not be granted because it is an infringement of a paper patent deliberately held in nonuse for a wrongful purpose.

The injunction is not asked against the use of a machine which infringes one which the plaintiff below is making and vending under a patent, but against the use of a machine which infringes a patent under which the plaintiff is not making and vending, and one which the plaintiff intends to withhold from the public.

The manifest purpose is to withhold the infringed device from commercial use with the view of forcing another into the paper bag industry; and thus the concrete question is whether equity by injunction will aid such a purpose with respect to a legal right.

There is no pretense in this case that equitable aid is asked to protect from infringement the patent the plaintiff is using in its business. In the aspect most favorable to the plaintiff, the relief sought is injunction protection to a business or an industry built up in using a particular invention, and through acquiring and holding in deliberate nonuse a competing invention by way of protection.

It results, therefore, that a court of equity is asked not to protect from infringement the statutorily intended monopoly of the right to make, use, and vend under a particular patent, but to protect a monopoly beyond and broader than that, a monopoly in aid of the rightful statutory monopoly of the patent in use. The proposition involves the idea of a secondary monopoly maintained to stifle patent competition in the trades and industries, and thus contemplates a condition which at once contravenes the manifest purpose of the Constitution, and a monopoly of a kind and breadth and for a purpose in no sense ever contemplated by the statutory contract which safeguards the legal right to make, use, and vend under a particular patent.

My contention is not that an individual or a corporation may not buy and hold competing patents and control them in a strictly legal sense, and recover such damages at law for infringement as the rules of law accord to the owner for the invasion of such a legal right,

but that equity should not by the arm of injunction aid the owner in a purpose to control and suppress invention and to retard intended benefits which in the ordinary course of manufacture and trade, uninfluenced by unconscionable and inequitable control, would naturally flow in trade and commerce.

The legal right of ownership and right of legal control of patent rights is not at all denied; but why should equity through injunction help a man or a corporation to so unreasonably exercise the legal right as to effectuate the withdrawal of patents from their position in the field of utility, to the end that a single and perhaps an inferior right or monopoly shall be exclusively forced into business and upon the public, for the pecuniary gain of private ownership at the expense of the public? The primary purpose of the framers of the Constitution was not unconscionable private pecuniary gain, but to encourage invention in the interests of general business and of the public, and the act of Congress which followed soon after was to protect the right to make, use, and vend, under a given patent, thus stimulating invention in the public interest, and there was no thought of giving countenance to the idea of acquiring and locking up inventions, and improvements upon inventions, to the end that the general benefits of invention should be turned back; and the idea that a court of equity should help to accomplish such a result is contrary to the spirit of equity, and offends public policy.

Equity may look to the object of litigation and to the object of the relief sought, and thus, as already said, it is found that the primary and substantial object of the litigation here is not to protect the paper patent in suit, which is locked in nonuse, but to aid the patent monopoly of another patent which is not in suit, one which is in use, but not infringed—all to the real and manifest end that patent competition shall be stifled and destroyed, and that the business public engaged in the paper-bag industry shall be driven to the use of a particular patent machine not covered by the patent in litigation and one not infringed.

Simple nonuse is one thing. Standing alone, nonuse is no efficient reason for withholding injunction. There are many reasons for nonuse which, upon explanation, are cogent, but when acquiring, holding, and nonuse are only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels—a hypothesis involving an attitude which offends public policy, the con-

science of equity, and the very spirit and intention of the law upon which the legal right is founded—it is quite another thing. This is an aspect which has not been considered in a case like the one here.

One may suppress his own. This is unquestionably decided, but when the suppression is for a wrongful purpose a taint is created. and a court of equity may look beyond the fictitious issue, in respect to protection of a paper patent which is locked up, and to the underlying and substantial issue, which involves the question whether equity will help a monopolistic exclusion of a beneficial right from public use, when the purpose is to force another and a different thing upon the public, under conditions which at once overturn the whole theory of government protection of patents intended to stimulate invention, to the end that the benefits of discovery shall, under reasonable competitive patent conditions, flow to the trades and industries.

Extreme illustrations may be used to test the reasonableness of a legal or an equitable proposition. If it is legal and equitable for individuals or corporations to buy and suppress one patent for the purpose of forcing another into trade and into control in a given industry, they may upon the same legal and equitable logic buy and suppress all, together with the public interest, and it is when the real and substantial purpose is not to safeguard a particular right, but to suppress it under the forms of law and to arbitrarily force another, that the equitable situation changes.

Under the Constitution and the statute in aid of the constitutional provision with reference to inventions and discoveries, it was intended to stimulate art and invention under competitive conditions by protecting the right to each inventor, or each owner to make use, and vend, and, if equity is to aid in stultifying this plain intent through affirmative relief by injunction, by protecting patent aggregations held in deliberate nonuse for the purpose of excluding all patent benefits except such as the holder sees fit to bestow, it will help to overthrow the intended meritorious patent competition under normal conditions in trade, and will help to deny the intended benefits to the public.

In the case at bar the patent in suit is deliberately suppressed. There has been no attempt to put it into commercial use. It relates to the very important and far-reaching paper bag industry. The only machine ever made under the patent was one made at an expense of many thousand dollars for use as an exhibit in this litigation. . . .

Reasonable considerations of wise public policy, and of principles governing equitable jurisprudence, require that equitable aid, through the discretionary arm of injunction, should be withheld from one who attempts to unreasonably and inequitably oppress the general public, and to so use a naked legal right, which inheres in a situation involving a government purpose, and into which the public right in a sense enters, as to offend and wholly reverse the plain spirit and policy of the fundamental law upon which the right is founded.

Justification of noninjunction intervention under such circumstances invokes no novel doctrine. Noninterference under such conditions is based upon fundamental and substantial grounds of justice and equity. Artificial statutory rights, existing in deliberate nonuse for purposes of control and to dominate business, with the legal right aided by equitable injunction, would at once become a thing altogether intolerable and indefensible. . . .

WALCOT v. WALKER.

(In Chancery, 1802, 7 Ves. 1.)

The bill prayed an injunction to restrain the defendants, who were booksellers, from publishing two editions of the plaintiff's works; upon a dispute as to the construction of the agreement between the parties.

The defendants by their answer admitted, that they had published in one of these editions some of the plaintiff's works, which they were not authorized to publish. As to that edition, therefore, they submitted . . .

LORD CHANCELLOR ELDON. If the doctrine of Lord Chief Justice Eyre, (*Dr. Priestley's Case*, see 2 Mer. 473), is right, and I think it is, that publications may be of such a nature, that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of such a nature, that the author can maintain no action at law for the invasion of that, which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer, that the defendants are

as criminal. It is the duty of the court to know, whether an action at law would lie; for, if not, the court ought not to give an account of the unhallowed profits of libellous publications. At present I am in total ignorance of the nature of this work, and whether the plaintiff can have a property in it or not. As to one of these editions, it is not possible to grant the injunction, until the right of the plaintiff has been tried in an action. The facts may alter the effect of the agreement at law; and that must be looked to as to the right in equity. It is not immaterial also, that they have been permitted to publish in their trade for six years together without an action. But, even as to the other edition, before I uphold any injunction, I will see these publications, and determine upon the nature of them; whether there is question enough to send to law as to the property in those copies; for, if not, I will not act upon the submission in the answer. If upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and if doubtful, I will send that question to law.

Therefore let the injunction be dissolved as to the octavo edition; with liberty to apply for an injunction, in case the plaintiff succeeds in an action. As to the duodecimo edition, dissolve the injunction, unless in a week they bring the books into court.

SECTION VIII. INTERFERENCE WITH TRADE INTERESTS —FRAUD.

TABOR v. HOFFMAN.

(New York Court of Appeals, 1889, 118 N. Y. 30, 23 N. E. 12.)

The object of this action was to restrain the defendant from using certain patterns alleged to have been surreptitiously copied from patterns belonging to the plaintiff that had not been made public.

The trial court found that the plaintiff, having invented a pump known as "Tabor's Rotary Pump," which was patented, made a complete set of patterns to manufacture the same; that he necessarily spent much time, labor and money in making and perfecting such

patterns, which were always in his exclusive possession; that from time to time he made improvements upon the pump and incorporated the same in the patterns, which were never thrown on the market nor given to the public; that one Francis Walz, after the patents had expired, surreptitiously made for the defendant a duplicate set of said patterns from measurements taken from the patterns of the plaintiff, without his knowledge or consent while they were in the possession of said Walz to be repaired; that before the commencement of this action the defendant, with knowledge of all these facts and without the consent of the plaintiff, had commenced to make and since then has made pumps from said patterns, thus obtained; that the plaintiff has established a large and profitable trade in said pumps which "will be injured and the plaintiff damaged, if the defendant is permitted" to continue to manufacture from said patterns. . . .

VANN, J. It is conceded by the appellant that, independent of copyright or letters patent, an inventor or author, has, by the common law, an exclusive property in his invention or composition, until by publication it becomes the property of the general public. This concession seems to be well founded and to be sustained by authority. (*Palmer v. DeWitt*, 47 N. Y. 532; *Potter v. McPherson* 21 Hun, 559; *Hammer v. Barnes*, 26 How. Pr. 174; *Kiernan v. M. Q. Tel. Co.* 50 id. 194; *Woolsey v. Judd*, 4 Duer, 379; *Peabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. Rep. 400; *Phillips on Patents*, 333-341; *Drone on Copyright*, 97-139.)

As the plaintiff had placed the perfected pump upon the market, without obtaining the protection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein. (*Rees v. Peltzer*, 75 Ill. 475; *Clemens v. Balford*, 14 Fed. Rep. 728; *Short's Laws of Literature*, 48).

But the completed pump was not his only invention, for he had also discovered means, or machines in the form of patterns, which greatly aided, if they were not indispensable, in the manufacture of the pumps. This discovery he had not intentionally published, but had kept it secret, unless by disclosing the invention of the pump, he had also disclosed the invention of the patterns by which the pump was made. The precise question, therefore, presented by this appeal, as it appears to us, is whether there is a secret in the patterns that yet remains a secret, although the pump has been given to the

world? The pump consists of many different pieces, the most of which are made by running melted brass or iron in a mold. The mold is formed by the use of patterns which exceed in number the separate parts of the pump, as some of them are divided into several sections. The different pieces out of which the pump is made are not of the same size as the corresponding patterns, owing to the shrinkage of the metal in cooling. In constructing patterns it is necessary to make allowances, not only for the shrinkage, which is greater in brass than in iron, but also for the expansion of the completed casting under different conditions of heat and cold, so that the different parts of the pump will properly fit together and adapt themselves by nicely balanced expansion and contraction to pumping either hot or cold liquids. If the patterns were of the same size as the corresponding portions of the pump, the castings made therefrom would neither fit together, nor if fitted, work properly when pumping fluids varying in temperature. The size of the patterns cannot be discovered by merely using the different sections of the pump, but various changes must be made and those changes can only be ascertained by a series of experiments, involving the expenditure of both time and money. Are not the size and shape of the patterns, therefore a secret which the plaintiff has not published and in which he still has exclusive property? Can it be truthfully said that this secret can be learned from the pump when experiments must be added to what can be learned from the pump before a pattern of the proper size can be made? As more could be learned by measuring the patterns, than could be learned by measuring the component parts of the pump, was there not a secret that belonged to the discoverer, until he abandoned it by publication, or it was fairly discovered by another?

If a valuable medicine, not protected by patent, is put upon the market, anyone may, if he can by chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in course of his employment had aided in compounding the medicine, and had thus become familiar with the formula.

The courts have frequently restrained persons, who have learned a secret formula for compounding medicines, beverages and the like while in the employment of the proprietor, from using it themselves or imparting it to others to his injury, thus in effect holding, as was said by the learned General Term, "That the sale of the compounded article to the world was not a publication of the formula or device used in its manufacture." (*Hammer v. Barnes*, *supra*; *Morison v. Moat*, 21 L. J. (N. S. 248; S. C. 20 id., 513; *Green v. Folgham*, 1 Sim. & Stu. 398; *Yovatt v. Winyard*, 1 Jac. & Walk. 394; *Peabody v. Norfolk*, *supra*; *Salomon v. Hertz*, *supra*; *Kerr on Injunctions*, 181; *High on Injunctions*, § 663).

The fact that one secret can be discovered more easily than another, does not affect the principle. Even if resort to the patterns of the plaintiff was more of a convenience than a necessity, still if there was a secret, it belonged to him, and the defendant had no right to obtain it by unfair means, or to use it after it was thus obtained. We think that the patterns were a secret device that was not disclosed by the publication of the pump, and that the plaintiff was entitled to the preventive remedies of the court. While the defendant could lawfully copy the pump, because it had been published to the world, he could not lawfully copy the patterns because they had not been published, but were still, in every sense, the property of the plaintiff, but also the discovery which they embodied.

The judgment should be affirmed, with costs.

FOLLETT, Ch. J. dissenting. An inventor of a new and useful improvement has a right to its exclusive enjoyment, which right he may protect by a patent or by concealment. The plaintiff's patent had expired and all of the parts of the pump represented by the patterns had been for a long time on sale in the form of a completed pump. The patent on the original invention having expired and the plaintiff having voluntarily made the subsequent improvements public by selling the improved article, he lost his right to their exclusive use. The plaintiff's counsel concedes this; but says that while patterns could be made from the several parts of the pump, from which pumps like those made and sold by the plaintiff could be produced, that it was more difficult to make patterns from sections of the pump than from the patterns. This was so found by the court and cannot be gainsaid. The invention was not the patterns but the idea represented

by them, to which the plaintiff had lost his exclusive right. Neither the defendant nor the man who made the patterns sustained any relation by contract with the plaintiff. They were neither the servants nor partners of the plaintiff, and they owed him no duty not owed by the whole world. The act, at most, was a trespass and the plaintiff made no case for equitable relief. It is neither asserted nor found that the defendant is unable to respond in damages. The cases cited to sustain the judgment arose out of the relation of master and servant or between partners, and in all of them the idea had not been disclosed to the public, but had been kept secret by the inventor.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur with Vann, J., except Follett, Ch. J., dissenting, and Bradley and Haight, J. J., not sitting.

Judgment affirmed.

REGIS v. JAYNES & CO.

(Supreme Court of Massachusetts, 1904, 185 Mass. 458, 460, 70 N. E. 480.)

Bill in equity filed June 12, 1903, to restrain the defendants from using the word "Rex," or the word "Rexall" alone or with other words in connection with the manufacture and sale of dyspepsia tablets.

BRADLEY, J. When the plaintiff, Ellen M. Regis, first compounded her preparation in the form of pills she marked on the boxes in which they were sold the word "Rex," from which her family surname was derived. She not only adopted and attached it as the distinctive feature indicative of the origin, identity and proprietorship of her cure for dyspepsia, but filed it as a trade mark under St. 1895, c. 462, § 1. No evidence appears that at any time she has abandoned or ceased to use it, but the contrary is true. She has formed a partnership with her son, and from small sales in its original form and within a circumscribed territory other and more attractive combinations have been made, and the business has slowly increased in value and extended into larger fields. This is enough in the present case to establish an exclusive right of property in the plaintiffs to the device or name used in their business. *Burt v. Tucker*, 178 Mass. 493.

Lawrence Manuf. Co. v. Tennessee Manuf. Co. 138 U. S. 537.

It may be conceded that words which are merely descriptive of the style and quality of an article cannot be appropriated and used for this purpose by the manufacturer in the description of his wares to the exclusion of a similar use by others; but any words or devices that have for their principal object to make plain the identity of the owner with specific goods prepared and sold by him are not so classed, but may constitute a valid trade mark. *Lawrence Manuf. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 327; *Frank v. Sleeper*, 150 Mass. 583; *Samuels v. Spitzer*, 177 Mass. 226; *Lawrence Manuf. Co. v. Tennessee Manuf. Co.* *ubi supra*; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

Although the subsequent origin of the mark or name used by the defendants on their cure for dyspepsia is not stated, it is found that it was not originally intended as an imitation of that of the plaintiffs, but may be considered as a fanciful term invented by the United Drug Company, and which was used to denote a particular proprietary medical compound put up and sold by it or its licensees.

But if no intention to wrongfully injure the plaintiffs is manifested in the origin of "Rexall," this does not constitute a defense where priority of ownership and continuous use is shown of the device or mark of which it is found to be an imitation, and buyers are likely from the resemblance to be misled and purchase the defendants' cure when they desire to buy and believe they are getting the remedy made by the plaintiffs. *Gilman v. Hunnewell* 122 Mass. 139; *Burt v. Tucker*, *ubi supra*; *North Chesire & Manchester Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83.

A mere comparison of the different words, devices or designs which may be used for the purpose of a trade mark is not enough to make out the main fact to be proved, but the plaintiffs must go further and establish the essential proposition on which a case like this depends, that taking all the circumstances, the form of manufacture, names, labels, shape of boxes or receptacles in which they are sold, there exists a reasonable probability that purchasers using ordinary care will be deceived by the similarity of names and led into mistaking one medicine for the other. *McLean v. Fleming*, 96 U. S. 245.

Among the various findings and rulings made by the master, the only one now material is that in which he decides this principal issue

of fact, and to which the single exception argued by the defendants was taken.

An examination of the report shows that the remedies are compounded in the form of two kinds of tablets, to be taken in connection with each other, and in this respect there was a likeness between them, though the boxes used for each in form and the labels attached are so dissimilar that persons of ordinary intelligence, if no further resemblance was found, could easily distinguish them, yet upon the whole, in connection with the similarity of names, the similitude becomes such that purchasers not familiar with the exact appearance of each, and the boxes and labels with which they are sold, and exercising the care and observation of the average buyer, are likely to mistake the defendants' preparation for that of the plaintiffs.

This finding is well supported by the evidence and subsidiary findings stated in the report, and under our rule where all the evidence is not reported, therefore becomes final and is not to be disturbed. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 38.

But the master further determined that within a common territorial area, the United Drug Company, with the knowledge and consent of the defendants who are represented in the advertisements as sole agents for its sale, has advertised, while the defendants to a very limited extent have sold, this medicine as a specific for the same disease, but it did not affirmatively appear that such competition in trade at the time the bill was filed had led to any actual injury to the business of the plaintiffs, and for this reason he declined to assess damages. Presumably their prompt action, which did not allow sufficient time to pass before suit to ascertain the effect on their trade, had, to a very large degree, forestalled results which they feared might follow from, and probably would have been caused by, the unauthorized acts of the defendants.

If at common law an action for damages caused to a manufacturer whose goods were put upon the market under a trade mark and had acquired a distinctive value and reputation, could be maintained against another trader who fraudulently copies and places on the goods made by him a similar mark or label, in equity, relief can be granted not only as to damages already suffered, but an injunction can be awarded restraining such unlawful use in the future. *Thomson v. Winchester*, 19 Pick. 214; *Marsh v. Billings*, 7 Cush. 322, 332; *Lawrence Manuf.*

Co. v. Lowell Hosiery Mills, *ubi supra*; Holbrook v. Nesbitt, 163 Mass. 120.

If the choice of the trade device used by the defendants was innocent and not copied from the name used by the plaintiffs, yet it appears, and the master has found, that after notice given to them that their continued use of it was wrongful, because of the fact that it was an imitation of the plaintiffs' trade mark, they still allowed their names to appear in the same form of advertisement, and continued to sell their preparation without any change of name, shape or label. Such conduct of itself affords strong presumptive evidence of fraud. Orr v. Johnston, 13 Ch. D. 434. And their acts from that time at least must be considered as a direct and intentional infringement. New England Awl & Needle Co. v. Marlborough Awl & Needle Co. 168 Mass. 154; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85; Flagg Manuf. Co. v. Holway, 178 Mass. 83; Viano v. Baccigalupo, 183 Mass. 160; Upmann v. Forester, 24 Ch. D. 231; Manhattan Medicine Co. v. Wood, 108 U. S. 218.

Although the master has decided that the plaintiffs have not yet suffered any monetary loss, equity interferes when title and successful imitation have been established to prevent the impairment or destruction of the right itself, notwithstanding it may also be found that the reputation and use of the plaintiffs' remedy may be confined to a relatively small section of the State when compared with the field occupied by the defendants, and probably is less widely known and sold, and much inferior to their specific in popularity. Such a disparity in volume of trade, or in reputation, if held to be decisive as a limitation of the extent to which relief should be granted, affords no opportunity ordinarily for the organization and development of a business, though founded on a valid trade mark, where from a small and feeble beginning, if not subjected to unlawful interference by rivals, it may become a large and profitable enterprise, which the owner has a right to foster and establish. For the injury suffered in such a case is the same in kind, though it may differ in degree. Shaver v. Shaver, 54 Iowa, 208, 210, 212.

While the public are deceived and buy the spurious production in the belief that the imitation is the original article, yet the jurisdiction to award an injunction may well rest on the ground, that where a substantial business has been built up, the output of which has become

known to buyers under a designated device or name, such designation, when lawfully established, whether treated technically as a trade mark or trade name, is property in the same sense as the instrumentalities which the owner uses in making the specific thing that he vends in the market in this form. So that the proprietor of such a trade product, if another without authority uses similar devices intending to represent by them that the goods are identical, is entitled to protection from this wrongful and fraudulent appropriation of his property. *Weener v. Brayton*, 152 Mass. 101; *Bradley v. Norton*, 33 Conn. 157; *McLean v. Fleming*, *ubi supra*; *Hall v. Barrows*, 32 L. J. Ch. (N. S.) 548, 551; *Millington v. Fox*, 3 Myl. & Cr. 338.

As the plaintiffs have made out a case, they are entitled to an injunction to prevent and restrain further interference with the use and enjoyment of their property, and the defendants' exception to the master's report must be overruled and the report confirmed.

Decree for the plaintiffs accordingly.

WORLD'S DISPENSARY MEDICAL ASSOCIATION v.
PIERCE.

(New York Court of Appeals, 1911, 203 N. Y. 419, 96 N. E. 738.)

COLLIN, J. The action is to restrain unfair competition in the use of trade names.

The plaintiff was incorporated in 1879 under chapter 40 of the Laws of 1848 and the acts amendatory and supplemental thereto. The amendatory act, chapter 838 of the Laws of 1866, authorized an incorporation "for the purpose of carrying on any kind of manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative business." The object for which the plaintiff was incorporated were "the manufacturing, compounding and vending of medicines, consultation and operating in surgery, consultation and prescribing, furnishing and administering medicines and other curative and hygienic agents for invalids and furnishing care, attendants and home accommodations for the same." One Ray V. Pierce, a physician, transferred to the plaintiff upon its incorporation his business of manufacturing and selling under their trade names proprietary remedies

and conducting a private hospital and medical practice. The proprietary remedies which the plaintiff manufactures and sells are named "Dr. Pierce's Golden Medical Discovery," "Dr. Pierce's Favorite Prescription," "Dr. Pierce's Pleasant Purgative Pellets," "Dr. Pierce's Compound Extract of Smart Weed or Water Pepper," "Dr. Pierce's Lotion Tablets," "Dr. Pierce's Cough Syrup," "Dr. Pierce's Ammonio Camphorated Liniment," and "Dr. Pierce's Medicated Soap," which are commonly known to the public as "Dr. Pierce's Remedies" and also as "Pierce's Remedies." Ray V. Pierce has been at all times and is now the president and a director of the plaintiff and devised the formula for each remedy. The lotion tablets are sold in boxes, having upon their tops the words "Dr. Pierce's Purifying and Strengthening Lotion Tablets, World's Dispensary Medical Association, Props., Buffalo, N. Y.," and elsewhere the words "Dr. Pierce's Genuine Family Medicines," together with a facsimile signature of Ray V. Pierce, to wit: "R. V. Pierce, M. D." A part of the business of the plaintiff has been and is carrying on the hospital and medical practice founded by Ray V. Pierce. The plaintiff's remedies have become widely and favorably known and have an extensive sale throughout the United States and elsewhere.

The defendant since some time after 1899 has advertised and sold a certain proprietary remedy in the form of tablets under the name of "Dr. Pierce's Tansy, Cotton Root, Pennyroyal and Apol Tablets," which are put up in boxes having on their tops the words "Dr. Pierce's Empress Brand Tansy, Cotton Root, Pennyroyal and Apol Tablets," and elsewhere the words "Dr. Pierce's Empress Brand" and the words "the genuine has signature on box R. J. Pierce," the words "R. J. Pierce" being a facsimile signature. He is selling also another proprietary remedy known as "Pierce's Empress Brand Pennyroyal Tablets" in boxes having upon their tops those descriptive words and elsewhere the words "The Genuine has the signature on box R. J. Pierce," the words "R. J. Pierce" being a facsimile signature. The defendant is not a licensed physician, nor entitled to practice as such under the law of the state. The trial court found as facts that the use by defendant of the words "Dr. Pierce" is unlawful; that the names and labels used by defendant are calculated and designed to cause the public to believe that the defendant's remedies are manufactured and sold by plaintiff, and confusion between the business and remedies of the

parties will be created by their continued use; and as conclusions of law that the defendant in using the names designating his remedies is unfairly competing with the plaintiff, and that by a judgment the defendant be forever restrained from using in connection with his remedies those names or the words "Dr. Pierce" or "Dr. Pierce's," or any name which includes the word "Pierce" or "Pierce's" in such manner as to be calculated or designed to cause the purchasers of his remedies to believe them to be manufactured or sold by the plaintiff, or the word "Pierce" or "Pierce's" in connection with his business in such manner as to deceive or be calculated to deceive the public or the customers of either of the parties. The judgment of the Special Term was unanimously affirmed.

The principal contention of the defendant is that the plaintiff cannot lawfully practice medicine and conduct the hospital because it is a stock corporation (See *People v. Woodbury Dermatological Institute*, 192 N. Y. 454), and that the judgment protects its use of the trade name "Dr. Pierce" in its illegal practice, and, therefore, violates the rule that a plaintiff who does not come into a court of equity with clean hands is refused relief. (*Prince Manfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24; *N. Y. & N. J. Lubricant Co. v. Young*, 77 N. J. Eq. 321). A majority of the court do not think it necessary, under the findings of the trial court, to consider and decide whether or no the plaintiff is violating the law of the state by practicing medicine and conducting the hospital. They are of the opinion that even if it should be held that it is violating the law in this respect, it would not thereby be debarred from protection, otherwise proper, in respect of its manufacture and sale of proprietary remedies which are entirely separate from and in no manner connected with the practice of medicine. . . .

Appellant's contention that the judgment is too broad and drastic is well founded. Its restraint of the defendant from the use in any way of the designations "Dr. Pierce" or "Dr. Pierce's" is legal and just, because he is not a licensed physician nor entitled to practice under the law of the state. (Public Health Law, §§ 161, 174.) The defendant has, however, the right to use his own name in his own business. It is a general principle of law that one's name is his property, and he has the same right to its use and enjoyment as he has to that of any other species of property. (*Chas. S. Higgins Co.*

v. Higgins Soap Co., 144 N. Y. 462; Brown Chemical Co. v. Meyer, 139 U. S. 540.) It is, however, also a general principle of law that no man has the right to sell his products or goods as those of another. He may not through unfairness, artifice, misrepresentation or fraud injure the business of another or induce the public to believe his product is the product of that other. The law protects the honest dealer in the business which fairly is his, and the public from deception in trade. In this case, as in others which have been before the court, these principles must, because of the identity in the surname of the defendant and the trade name used by the plaintiff be reconciled and amalgamated. The plaintiff and its predecessor, Dr. Pierce, solely through a long period prior to 1899 associated the name Pierce with the proprietary remedies sold by it and which had acquired a high reputation and an extensive market. The name designates and causes the public to buy the remedies with which it is associated as those of the plaintiff. It when associated with the defendant's remedies is "calculated and designed to deceive and defraud the public, and the buyers and users of the plaintiff's proprietary remedies and tablets." The defendant has the right to use his name. The plaintiff has the right to have the defendant use it in such a way as will not injure his business or mislead the public. When there is such a conflict of rights, it is the duty of the court so to regulate the use of his name by the defendant that, due protection to the plaintiff being afforded, there will be as little injury to him as possible. Defendant should so use his name in connection with his remedies that he will obviate deception or with an explanation which will inform or be a notice to the public that those remedies are not those of plaintiff (*Herring-Hall-Marvin Safe Co. v. Hall's Safe Company*, 208 U. S. 554; *Devlin v. Devlin*, 69 N. Y. 212; *Meneely v. Meneely*, 62 N. Y. 427.)

We have already stated that the defendant cannot use his name with the prefix "Dr." We have concluded that due and adequate protection will be afforded to the plaintiff and the public if the defendant is enjoined additionally from using the words "Pierce" or "Pierce's" in advertising, describing, designating, labelling or selling his proprietary remedies unless said words be immediately preceded on the same line therewith by defendant's first or proper christian name and his middle name or the initial letter thereof in letters identical in size, color, style of type and conspicuousness with those of said

word so that said word shall not appear for any of the purposes aforesaid except when thus conjoined with the words "Robert J." or "Robert" followed by the middle name of the defendant. . . .

ROUTH v. WEBSTER.

(In Chancery, 1847, 10 Beav. 561.)

In 1846 a joint-stock company, called "The Economic Conveyance Company," was established, having for its object the carrying passengers by steamboat and omnibus at the average rate of 1d. a mile. The Defendants, the provisional Directors, had published prospectuses in which the name of the Plaintiff was used, without his authority, as a trustee of the Company. They also paid monies into the Bankers of the Company to the Plaintiff's account as trustee.

The Plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the Directors, and now moved for an injunction to restrain them from using his name in connection with the Company. . . .

THE MASTER OF THE ROLLS.

The sort of opposition made to the application to prevent the unauthorized use of the Plaintiff's name furnished a specimen of the anxiety of the Defendants to avoid unnecessary litigation.

I think that the Plaintiff is entitled to the injunction. I have no doubt that the Plaintiff never did consent to be a trustee. The Defendant Webster might have thought he did; if he did, his belief rested upon a very slight foundation. However, the name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee: his name was also used at the bankers; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the Defendants in using his name. Money was placed in his name at the bankers, and he is left to get rid of his responsibility as he can.

The defendants having published his name as a trustee, some negotiation took place for giving the Plaintiff an indemnity, and which he was willing to accept as a condition for his not applying for an injunction. This was not given, and then the matter remained as it

was before. He now moves for an injunction to prevent the Defendants proceeding in the same course for the future, and the Defendants' not pretending that they have a right to continue the use of his name, and disavowing any intention of doing so, nevertheless file affidavits in opposition to the application.

I am of opinion that the Plaintiff is entitled to the injunction; and, if it subjects the Defendants to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not.

Is not the Plaintiff entitled to be protected against a repetition of those misrepresentations which have already been made? I am willing to believe the statement made on behalf of the Defendants, that they do not intend to repeat their misrepresentations; but I think the Plaintiff is not bound to rely on their assurance, and that he is entitled to be protected by the order and injunction of this court.

SECTION IX. INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS

AMERICAN LAW BOOK CO. v. EDWARD THOMPSON CO.

(Supreme Court of New York, 1903, 41 N. Y. Misc. 396, 84 N. Y. Supp. 225.)

BISCHOFF, J. By preliminary injunction in an action for injunctive relief the plaintiff seeks to restrain the defendant from making agreements with subscribers to the plaintiff's encyclopedia, whereby the defendant undertakes to indemnify these subscribers against claims for damages for their breach of contract in declining to receive and pay for the plaintiff's books, and from conducting and defraying the expenses of the defense to any action brought against the subscriber

by the plaintiff. The complaint alleges that these agreements have been systematically offered by the defendant to the plaintiff's subscribers for the purpose of causing them to subscribe to the defendant's encyclopedia, and to repudiate their subscriptions for the work published by the plaintiff; and the allegations further disclose the making of intentional misrepresentations by the defendant to these subscribers as to the relative merits of the encyclopedias for the purpose of inducing the breach of contract. The defendant admits the making of the agreements in question, but asserts that the plaintiff has no remedy in equity upon the allegations of the complaint, the contention being that the plaintiff has his remedy at law for each contract broken, that the party to that contract has the right to break it and pay damages, and that what the party can do another person may ask him to do without restraint by injunction. It is also argued that the cases in which an injunction has been granted to prevent the solicitation of a breach of contract are found to have involved only contracts for personal services, and that there is no precedent for such an injunction as the plaintiff seeks. If there be no exact precedent for this injunction, none is needed. The complaint avers, and the affidavits support the averment, that the defendant is engaged in an attempt to obtain business which the plaintiff has secured, having no regard to fairness of competition but with resort to trick and device.

Whether the subscribers are in each instance actually led by the defendant's misrepresentations to break the particular contracts is not important, and is not an essential averment of the complaint. Intentional false statements, made with a view to obstruct the plaintiff's business and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition. The fraudulent intent, followed to fruition in the actual inducement of persons dealing with the plaintiff to break their contracts for the intended benefit of the defendant and to the intended injury of the plaintiff, is the basis of the defendant's wrong; a wrong which our system of remedial justice recognizes as the subject of relief. *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Rich v. R. R. Co.*, 87 N. Y. 390, and, see, *Bowen v. Hall*, 6 Q. B. D. 333.

That an action for damages would not afford an adequate remedy is obvious. The loss of business and the injury to business reputation

resulting from the defendant's act of obstruction, and from the consequent litigation between the plaintiff and its delinquent subscribers, could not be estimated nor proven with any degree of certainty for the purpose of a recovery; nor could the plaintiff properly estimate the additional burden of the future litigation with subscribers, whose defense would (as is to be inferred from the past) be conducted by the defendant at great pains and expense, bearing no relation to the amount of the claim, but solely in the interest of obstruction and for advertising purposes. The invasion of a legal right being apparent, and the inadequacy of relief at law being clear, a case for injunctive relief is made out; and, indeed, direct authority for an injunction upon a very similar state of facts is not wanting. *Stoddard v. Key*, 62 How. Prac. 137. . . .

HAMILTON BROWN SHOE CO. v. SAXEY.

(Supreme Court of Missouri, 1895, 131 Mo. 212, 32 S. W. 1106.)

PER CURIAM: This is an appeal from the final judgment of the circuit court of the city of St. Louis, on a demurrer to the plaintiff's petition. . . .

The case was tried before the Hon. L. B. Valliant, one of the judges of that court, who on sustaining the demurrer delivered the following opinion:

"The amended petition states in substance that the plaintiff conducts a large shoe manufactory in this city and has in its employ some eight or nine hundred persons, all of whom are earning their living in plaintiff's employment, and are desirous of so continuing; that the defendants, except two of them, were lately in plaintiff's employ but have gone out of the same on a strike and are now, with the other two defendants, engaged in an attempt to force the other employees of plaintiff to quit their work and join in the strike, and that to accomplish this purpose they are intimidating them with threats of personal violence; that among the plaintiff's employees who are thus threatened are about three hundred women and girls and two or three hundred other young persons; that the effect of all this on the

plaintiff's business if the defendants are allowed to proceed would be to inflict incalculable damage.

"Upon filing this amended petition and the plaintiff's giving bond, as required by law, a temporary injunction issued restraining the defendants from attempting to force the plaintiff's employees to leave their work by intimidation and threats of violence, or from assembling for that purpose in the vicinity of plaintiff's factory.

"The defendants have appeared by their counsel and, by their demurred filed, admit that all the statements of the amended petition are true; but they take the position that even if they are doing the unlawful acts that they are charged with doing, still this court has no right to interfere with them, because they say that what they are doing is a crime by the state law of this state, and that for the commission of a crime they can only be tried by a jury in a court having criminal jurisdiction.

"It will be observed that the defendants do not claim to have the right to do what the injunction forbids them doing; their learned counsel even quotes the statute to show that it is a crime to do so; but he contends that the constitution of the United States and the constitution of the state of Missouri guarantee them the right to commit crime with only this limitation to wit: that they shall answer for the crime, when committed, in a criminal court, before a jury; and that to restrain them from committing crime is to rob them of their constitutional right of trial by jury.

"If that proposition be correct, then there can be no valid statute to prevent crime. But that position is contrary to all reason. The right of trial by jury does not arise until the party is accused of having already committed the crime. If you see a man advancing upon another with murderous demeanor and a deadly weapon, and you arrest him, disarm him, you have perhaps, prevented an act which would have brought about a trial by jury, but can you be said to have deprived him of his constitutional right of trial by jury? The train of thought put in motion by the argument of the learned counsel for defendants on this point leads only to this end, to wit, that the constitution guarantees to every man the right to commit crime so that he may enjoy the inestimable right to trial by jury.

"Passing now to the question relating to the particular jurisdiction of a court of equity, we are brought to face the proposition that a

court of equity has no criminal jurisdiction, and will not interfere by injunction to prevent the commission of a crime. These two propositions are firmly established; and as to the first, that a court of equity has no criminal jurisdiction, there is no exception. As to the second, that a court of equity will not interfere by injunction to prevent the commission of a crime, that, too, is perhaps without exception when properly interpreted; but it is sometimes misinterpreted. When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual, a court of equity will interfere to prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case.

"On this question counsel have cited cases in which courts of equity have been denied jurisdiction to enjoin the publication of a libel, and in those opinions are to be found the general statement of the proposition above mentioned. But the law of libel is peculiar, and those cases turn upon that peculiarity. The freedom of the press has been so jealously guarded, both in England and in this country, that our law of libel is like no other law on the books. Our constitution provides that a man may say, write, and publish "whatever he will," being answerable only for the "abuse of liberty." Libel is the only act injurious to the rights of another which a man can not, under proper conditions, be restrained from committing; and that is so because the constitution says he shall be allowed to do it and answer for it afterwards.

"Equity will not interfere when there is an adequate remedy at law. But what remedy does the law afford that would be adequate to the plaintiff's injury? How would their damages be estimated? How compensated? The defendants' learned counsel cites us to the criminal statute, but how will that remedy the plaintiff's injury? A criminal prosecution does not propose to remedy a private wrong. And even if there was a statute giving a legal remedy to plaintiff, it would not

oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. What a humiliating thought it would be if these defendants were really attempting to do what the amended petition charges, and what their demurrer confesses, that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys, and girls who are earning their livings in the plaintiff's employ, to quit their work against their will, and yet there is no law in the land to protect them!

"The injunction in this case does not hinder the defendants doing anything that they claim they have a right to do. They are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own. And they have a right to use fair persuasion to induce others to join them in their quitting. But when fair persuasion is exhausted they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy the freedom and rights of others. The same law which guarantees the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure also guarantees the other employees the right to remain at their will and pleasure.

"These defendants are their own masters, but they are not the masters of the other employees, and not only are they not the masters of the other employees, but they are not even their guardians.

"There is a maxim of our law to the effect that one may exercise his own right as he pleases, provided that he does not thereby prevent another exercising his right as he pleases. The maxim, or rule of law, comes nearer than any other rule in our law to the golden rule of divine authority: 'That which you would have another do unto you, do you even so unto them.' Whilst the strict enforcement of the golden rule is beyond the mandate of a human tribunal, yet courts of equity, by injunction, do restrain men who are so disposed from so exercising their own rights as to destroy the rights of others.

"The demurrer to the amended petition is overruled."

The law applicable to the case is so clearly stated in this opinion of the learned judge, that to add anything to it would be a work of supererogation. We adopt it as the opinion of this court and affirm the judgment. All concur.

LOHSE PATENT DOOR CO. v. FUELLE.

(Supreme Court of Missouri, 1908, 215 Mo. 421, 114 S. W. 997.)

WOODSON, J. This suit had its origin in the circuit court of the city of St. Louis, the object of which is to enjoin the defendants from declaring and prosecuting a boycott against the appellant and its business. . . .

In brief, the petition charges defendants and those with whom they are affiliated with having entered into a conspiracy or an unlawful combination to injure and damage plaintiff's business by having coerced and intimidated certain contractors and builders from purchasing and using all building materials manufactured by it in any building to be constructed by them by prohibiting their members from working upon all buildings in which plaintiff's said materials were being used. . . .

The word "boycott" has been defined by many courts, in different language, but all agree substantially as to the meaning of the word. After an extensive review of the authorities, the Supreme Court of Minnesota, in the recent case of *Gray v. Building Trades Council*, 91 Minn. 1. c. 179, defines the word in the following language: "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Such acts constitute a conspiracy, and may be restrained by injunction."

If that is the proper definition of the word boycott, then the petition clearly charges the defendant with being guilty of boycotting plaintiff's

business, for the reason, as before stated, the petition charged the defendants, with having formed a combination to injure plaintiff's business, by having caused the builders of the city of St. Louis, against their will, to withdraw from plaintiff their beneficial business intercourse through threats that unless a compliance with their demands be made, the defendants will cause a strike to be called against the said business.

All the authorities hold that a combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy, regardless of the name by which it is known, and may be restrained by injunction. . . .

During the oral argument it was suggested by counsel that the case of *Clothing Co. v. Watson*, 168 Mo. 146, announced views not in harmony with those expressed by the courts in the cases before cited. We do not so understand that case. By a careful reading of that case it will be seen that the question there discussed was whether or not under the Constitution defendant in that case could be enjoined from publishing a boycott, and it was there held that he could not be so enjoined, but that is not the purpose of this suit. The clear object of this case is to prohibit the defendants from continuing the boycott in force heretofore declared or to enjoin the defendants from declaring a threatened boycott against plaintiff's business, and not to enjoin its publication. If the boycott itself is enjoined, there would be no occasion for complaint against its publication.

Learned counsel for defendants, several times, during the course of the oral argument of this case, asked the question: If a single individual may lawfully do all of the things which are charged against the defendants, then why may not two or more persons agree to do the same things without violating the law?

The answer is plain and simple. Neither the individual nor two or more persons can lawfully conspire to do the things charged. In the first place, the individual cannot do the things charged in the petition at all, either legally or illegally, for the reason he cannot conspire with himself to injure plaintiff's business however well his intention may be to do so; nor can he intimidate the builders from using materials manufactured by plaintiff, for the reason he has no associates bound to him

by contract or otherwise with which to intimidate them. It is true, the individual might make up his mind to injure plaintiff's business and determine in his own mind that he would work such injuries by threatening to no longer work for the builders and contractors if they continued to use materials manufactured by the plaintiff; but the practical working of such an undertaking by an individual would result in most, if not in all, instances in such a small loss to the builders and contractors over and above the profit they would probably make by continuing to deal with plaintiff, that the threat would have but little or no intimidating effect upon them, and in no manner force them from doing business with plaintiff. Certainly the law would take no notice of such infinitesimal loss nor such slight intimidation. *Lex non curat de minimis*.

But so much cannot be said regarding combinations or conspiracies formed between two or more persons to injure and destroy the business of a person by means of a boycott.

The books are full of cases where such combinations or conspiracies have wrought great injury and loss, and even wrecked and destroyed great and powerful business institutions and, if left untrammelled, would cause the strongest of them to fall, and the very foundation of our government to crumble.

Such combinations are differentiated from the labor organizations mentioned in paragraph one of this opinion by the fact that they are formed for the direct purpose of protecting and promoting the interests of the laboring classes, which only indirectly and incidentally operate in restraint of trade; while these have for their direct object the immediate effect to injure and damage the business of the persons at whom they are directed, and thereby compel them to discharge the non-union laborers, and thereby indirectly and incidentally protect and benefit the parties to the combination or conspiracy.

All of the authorities permit and encourage the former organizations in carrying out their laudable purposes, but the law with an equally firm hand prohibits all combinations and conspiracies which are formed for the purpose of working injury and damage to the business of another.

We are, therefore, of the opinion that the trial court erred in sustaining the demurrer to the petition.

CORNELLIER v. HAVERHILL SHOE MFRS. ASS'N.

(Supreme Court of Massachusetts, 1915, 221 Mass. 554, 109 N. E. 643.)

Bill in Equity, filed in the Supreme Judicial Court on January 25, 1913, against certain corporations and the members of certain partnerships engaged in the business of manufacturing shoes in Haverhill, to enjoin the defendants from interfering with the plaintiff's right to earn a livelihood, from the use of all black lists or other lists or devices containing the name of the plaintiff, for the assessment of damages and for further relief. . . .

DECOURCY, J. . . . The basis of the plaintiff's complaint is that the defendants conspired against him, and by means of a black list procured his discharge from employment. On December 12, 1912, the plaintiff, with thirty-nine other employees of the Witherell and Dobbins Company, went out on strike. He secured employment at the factory of Charles K. Fox, Inc., on December 14, began work on December 16, at 7:10 A. M., and was discharged in a summary and unusual manner about two hours later. The master finds that the cause of his discharge was the fact that he was one of the striking employees of the Witherell and Dobbins Company, and that there existed a tacit understanding, to which the Fox Company was a party, that those striking employees should not be employed. It appears that on the day of the strike, or the day after, and at the request of the defendant Child (who was the manager of the Shoe Manufacturers' Association), Mr. Dobbins brought to a meeting of the manufacturers several lists containing the names of the employees who had gone on strike. Copies of the list were prepared and circulated by the defendants for the purpose of preventing the strikers from getting work in Haverhill and vicinity, and of forcing them to abandon the strike and return to work at the Witherell and Dobbins Company's factory against their will. The acts of the several defendants in furtherance of this combination need not be recited. The master specifically has found that Cornellier was discharged at Fox's because of this "black list." It may be said in passing that of the twenty defendants named in the bill the master finds that only the following (herein referred to as the defendants) were responsible for the acts

1 Eq.—23.

complained of, namely, the Haverhill Shoe Manufacturers' Association, the Witherell and Dobbins Company, Gale Shoe Manufacturing Company, Charles K. Fox, Inc., Austin H. Perry, Ira J. Webster, Alwyn W. Greeley, Albert M. Child, George W. Dobbins and H. L. Webber.

Did this combination of the defendants to blacklist the striking employees of the Witherell and Dobbins Company, resulting in the discharge of and damage to the plaintiff, give him a legal cause of action? The statement of the general right of the Fox Company to terminate a workman's employment when and for what cause it chooses, where no right of contract is involved, does not carry us far. See *Coppage v. Kansas*, 236 U. S. 1. The same is true of the recognized equal rights of employers and employees to combine in associations or unions, so long as they employ lawful methods for the attainment of lawful purposes. See *Hoban v. Dempsey*, 217 Mass. 166. But it is settled that the intentional interference by even an individual, without lawful justification, with the plaintiff's right to have the benefit of his contract with his employer would be an actionable wrong. *Berry v. Donovan*, 188 Mass. 353. *Hansan v. Innis*, 211 Mass. 301. A combination to blacklist is the counter weapon to a combination to boycott and is open to similar legal objections, when directed against persons with whom those combining have no trade dispute, or when the concerted action coerces the individual members, by implied threats or otherwise, to withhold employment from those whom ordinarily they would employ. See *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, and cases cited.

It is true that in *Worthington v. Waring*, 157 Mass. 421, this court refused to enjoin the defendants from making use of a black list, stating that the rights alleged to be violated were personal and not property rights, and that there were no approved precedents in equity for issuing an injunction against the grievance there complained of. In the light of more recent decisions of the court recognizing that the right to labor and to its protection from unlawful interference is a constitutional as well as a common law right there appears to be no sound reason why it should not be adequately protected under our present broad equity powers. As intimated in *Burnham v. Dowd*, 217 Mass. 351, 359, the case of *Worthington v. Waring* cannot well be reconciled with our later decision. It must

be considered as no longer binding as an authority for the doctrine that equity will afford no injunctive relief against an unlawful combination to blacklist. . . .

Assuming that, if this were an action at law, the plaintiff could recover for the damages caused by the unlawful combination of the defendants to blacklist him, the question remains whether he is entitled to prevail in the present suit. He has brought these proceedings in a court of equity. Under the established maxim that "he who comes into equity must come with clean hands," the court will not lend its active aid to him if he has been in equal wrong with the defendants touching the transaction as to which relief is sought, but will leave him to his remedy at law. The strike at the Witherell and Dobbins factory in which he joined is intimately connected with the black list of which he complains. The plaintiff individually was free, under his contract at will, to terminate his employment for any reason that he deemed sufficient. He had an undoubted right to join a labor organization. The employer as an individual had similar rights. But while each had a right to organize with others, it by no means follows that the organizations lawfully could do everything that the individual could do. See *Martell v. White*, 185 Mass. 255, 260; *Pickett v. Walsh*, 192 Mass. 572, 582. An act lawful in an individual may be the subject of civil conspiracy when done in concert, provided it is done with a direct intention to injure another, or when, although done to benefit the conspirators, its natural and necessary consequence is the prejudice of the public or the oppression of individuals. 5 R. C. L. 1093.

Without discussing the conflicting authorities in other jurisdictions, in this Commonwealth, in the present stage of the industrial controversy, the principle is defined that the legality of a strike depends first upon the purpose for which it is maintained, and secondly on the means employed in carrying it on. As to the first, it is no longer in question that organized labor lawfully may strike for higher wages, shorter hours, and improved shop conditions. *Minasian v. Osborne* 210 Mass. 250, and cases cited. On the other hand it has been decided that a strike instituted merely to compel a closed shop would not be justifiable on principles of competition, but would be unlawful. *Reynolds v. Davis*, 198 Mass. 294; *Folsom v. Lewis*, 208 Mass. 336. In the debatable ground between these extremes the con-

flict of rights must be adjusted as new conditions arise. And the question whether any particular strike is lawful is a question of law. *DeMinico v. Craig*, 207 Mass. 593; *Burnham v. Down*, 217 Mass. 351, 356. . . .

It is clear from the findings of the master, however, that the Witherell and Dobbins strike was conducted by unlawful means; that laws were violated and the well established rights of others invaded. On several occasions crowds of strikers paraded in front of the factory, cheering and shouting "Come out," and occasionally adding the names of men who remained at work; once at least one hundred or more paraded in front of the factory; two by two in one direction and two by two in the opposite direction, so that there were four persons abreast most of the time, and the operatives leaving the factory had difficulty in breaking through the line. Some of the employees were intimidated and followed by crowds, others had to be escorted home by police officers, and four or five were assaulted by strikers or their sympathizers because they took the place of striking employees. One serious attack, characterized by the master as cowardly and unprovoked, was made on an employee named Mills, as he was going home after dark at the conclusion of his day's work. And while the persons who committed the assaults were not identified, the union and its officials made no effort to stop or control them; and the union men who were present when Mills was assaulted and rendered unconscious made no effort to give any aid or to pursue the man who struck the blow. The strike was carried on in a manner that reasonably caused the average employee to be apprehensive for his personal safety. The plaintiff cannot avoid responsibility for some, at least, of these acts. The strike, which was pending for more than three months after the bill was filed (as well as the "general" strike), was maintained under the direction of the union to which he belonged, and for the recognition of which he went on strike. He took part in the picketing and in at least one of the parades, and otherwise aided and encouraged it. See *Lawlor v. Loewe*, 235 U. S. 522.

The conduct of the plaintiff and the acts of others with whom he was legally identified preclude him from obtaining the active aid of a court of equity. For any damage caused by the black list which the defendants maintained he must seek his redress, if any, at law. Accordingly it becomes unnecessary to consider the effect upon his rights

of his participation in the general strike of December 30, and the further questions, whether that strike was for a lawful or an unlawful purpose, and whether it was conducted by lawful or unlawful means.

For the reasons herein set forth a decree is to be entered overruling the exceptions, confirming the master's report, and dismissing the bill of complaint.

HAWARDEN v. THE YOUGHIOGHENY & LEHIGH COAL CO.

(Supreme Court of Wisconsin, 1901, 111 Wis. 545, 87 N. W. 472.)

WINSLOW, J. The first count of the complaint is claimed to state a cause of action at law to recover damages resulting from an unlawful conspiracy, and the second count a cause of action in equity on behalf of a class to restrain the further execution of the conspiracy, and both counts are challenged by demurrer for insufficiency of facts.

1. The gist of the first count is that the plaintiff was a retail coal dealer in the city of Superior; that the defendants, "the wholesalers," own practically all the coal docks at Superior and Duluth, and that a retailer cannot carry on his business at Superior unless he can buy of the wholesalers freely and without discrimination; that the wholesalers entered into a combination with the defendant retailers by which it was agreed that the wholesalers should sell coal to the defendant retailers, and to none others, for the purpose, among others, of forcing out of the retail trade all retailers not in the combination, and among others the plaintiff; that such agreement or conspiracy has been successful, and as a result thereof the plaintiff's business has been destroyed, to his damage. Do these facts constitute a cause of action at common law? We think they do. It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their business and making greater gains by any legitimate means, and if, as the incidental result of that combination, others are driven out of business, there is no actionable wrong. It is also true that one person, or a number of persons, by agreement may refuse to sell goods to another, if the purpose of such refusal be simply to promote his or their own welfare. From these propositions it is argued that no actionable wrong is shown in the present case; that

the main purpose of the agreement charged was the lawful purpose to increase their own gains by legitimate means, and hence that the plaintiff is remediless, notwithstanding it is also charged that one purpose of the agreement was to drive the plaintiff out of business.

It may at once be admitted that this line of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of *State ex rel. Durner v. Huegin*, 110 Wis. 189, it was, in effect, repudiated. It is true that case was a criminal case, but it necessarily involved the question of civil conspiracies at common law, as well as criminal conspiracies, and to the very full discussion there given by Mr. Justice Marshall it seems that very little can profitably be added. It was there stated, in substance and effect, that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and this is so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury to such other is actionable. "Where the act is lawful for an individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it."

These principles are decisive as to the first count in this complaint. The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose, and constitutes malice in contemplation of law. Therefore, under the allegations of the complaint, it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has resulted, and hence that a cause of action at law for damages is stated. . . .

In the second count the plaintiff attempts on behalf of a class of persons, namely, the retailers who were excluded from the combination, to obtain equitable relief by way of a perpetual injunction restrain-

ing the continuance of the operations of the conspiracy. That courts of equity have jurisdiction to restrain such conspiracies when irreparable injury will result and legal remedies will prove inadequate or a multiplicity of suits be necessary, seems to be well settled. *Beck v. Railway T. P. Union*, 118 Mich 498. That the conspiracy may be directed against a considerable number of persons as well as against one, cannot be doubted. We have, therefore, before us an unlawful conspiracy directed against a large number of persons, which has already resulted in driving out of business a considerable number of such persons, and which the defendants threaten to continue indefinitely against the whole class.

Plaintiff claims that this situation brings the case within that provision of the statute contained in sec. 2604, Stats, 1898, which declares, "when the question is one of common or general interest of many persons, . . . one or more may sue for the benefit of the whole." The question as to the legality of this conspiracy is certainly one of common and general interest to all persons against whom it was directed and is being enforced. The complaint alleges that there are many of such persons, and we are unable to perceive any fault in the plaintiff's contention. It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of *George v. Benjamin*, 100 Wis. 622, and *Hodges v. Nalty*, 104 Wis. 464; hence what is said in those cases as to the number of persons which will be deemed "very numerous" is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons. These conditions are satisfied here, and we conclude that the second count states a good cause of action in equity by the plaintiff on behalf of himself and a class composed of all other retail coal dealers in Superior similarly situated. . . .

TUTTLE v. BUCK.

(Supreme Court of Minnesota, 1911, 107 Minn., 146, 119 N. W. 946.)

This appeal was from an order overruling a general demurrer to a complaint in which the plaintiff alleged:

That for more than ten years last past he has been and still is a barber by trade, and engaged in business as such in the village of Howard Lake, Minnesota, where he resides, owning and operating a shop for the purpose of his said trade. That until the injury hereinafter complained of his said business was prosperous, and plaintiff was enabled thereby to comfortably maintain himself and family out of the income and profits thereof, and also to save a considerable sum per annum, to wit, about \$800. That the defendant, during the period of about twelve months last past, has wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business, and compel plaintiff to abandon the same. That to that end he has persisted and systematically sought, by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given. That defendant is possessed of large means, and is engaged in the business of a banker in said village of Howard Lake, at Dassel, Minnesota, and at divers other places, and is nowise interested in the occupation of a barber; yet in pursuance of the wicked, malicious, and unlawful purpose aforesaid, and for the sole and only purpose of injuring the trade of the plaintiff, and of accomplishing his purpose and threats of ruining the plaintiff's said business and driving him out of said village, the defendant fitted up and furnished a barber shop in said village for conducting the trade of barbering. That failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, said defendant, with the wrongful and malicious purpose aforesaid, and not otherwise, has during the time herein stated hired two barbers in succession for a stated salary, paid by him, to occupy said shop, and to serve so many of plaintiff's patrons as said

defendant has been or may be able by the means aforesaid to divert from plaintiff's shop. That at the present time a barber so employed and paid by the defendant is occupying and nominally conducting the shop thus fitted and furnished by the defendant, without paying any rent therefor, and under an agreement with defendant whereby the income of said shop is required to be paid to defendant, and is so paid in partial return for his wages. That all of said things were and are done by defendant with the sole design of injuring the plaintiff, and of destroying his said business, and not for the purpose of serving any legitimate interest of his own. That by reason of the great wealth and prominence of the defendant, and the personal and financial influence consequent thereon, he has by the means aforesaid, and through other unlawful means and devices by him employed, materially injured the business of the plaintiff, has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage in the sum of \$10,000. . . .

ELLIOT, J. . . . For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of this idea are found in *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. 541, Id., 92 Minn. 230, 99 N. W.

882, and *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am St. 365.

Many of the restrictions which should be recognized and enforced result from a tacit recognition of principles which are not often stated in the decisions in express terms. Sir Frederick Pollock notes that not many years ago it was difficult to find any definite authority for stating as a general proposition of English law that it is wrong to do a wilful wrong to one's neighbor without lawful justification or excuse. But neither is there any express authority for the general proposition that men must perform their contracts. Both principles, in this generality of form and conception, are modern and there was a time when neither was true. After developing the idea that law begins, not with authentic general principles, but with the enumeration of particular remedies, the learned writer continues: "If there exists, then, a positive duty to avoid harm, much more must there exist the negative duty of not doing wilful harm; subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others, are all alike of a comprehensive nature." Pollock, *Torts*, (8th Ed.) p. 21. He then quotes with approval the statement of Lord Bowen that "at common law there was a cause of action whenever one person did damage to another, wilfully and intentionally, without just cause or excuse."

In *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330, Mr. Justice Hammond said: "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in (1898) A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that where a person has the lawful right to do a thing, irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person if actuated by one kind of a motive has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable

set of circumstances, the proposition does not commend itself to us as either logically or legally accurate." . . .

It is freely conceded that there are many decisions contrary to this view ; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of his business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the justices, however, are of the opinion that, on the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

SECTION X. DEFAMATION—INTERFERENCE WITH PRIVACY.

EMACK v. KANE.

(United States Circuit Court, 1888, 34 Fed. 46.)

BLODGETT, J. This is a bill in equity, in which the complainant seeks to restrain the defendant Kane from sending circulars injurious to the complainant's trade and business. Both complainant and defendants are manufacturers of what are known as "noiseless" or "muffled" slates for use of school children. . . . Since August 1, 1883, up to the filing of this bill, which was in March, 1884, the defendants have sent out to the trade,—that is, to the jobbers and persons engaged in this class of slates,—circulars threatening all who should buy from the complainant, or deal in his slates, with law-suits, upon the ground that complainant's slate is an infringement of the Goodrich patent as reissued. I do not intend to quote all these circulars, but extracts from a few will illustrate the character of the attacks which the defendants have made upon the complainant's business. In a circular issued September 26, 1882, and sent generally to the trade, occurs the following language:

"What do we propose to do with infringers? Nothing for the present, so far as prosecuting Emack is concerned, and for reasons that the trade well understand. We could stop him, of course, but he would open out the next day in another loft or basement, and under another name, and put us to the expense of another suit, and so on indefinitely. When we commence suit we want to be sure of damages. The language of the original patent was somewhat am-

biguous, and hence there was some excuse for those who sold it, believing that it was not an infringement. There can be no mistake now. The language of the claims could not be made plainer. Any dealer who now sells the Emack slate knows that he is selling an infringement of our patent, and we shall protect ourselves and our friends by holding all who are responsible for royalty and damages."

"To our friends: We will say that very few jobbers have handled the Emack slate. Failing to sell to the jobbing trades, he went to the leading retailers, and sold them all he could. They, of course, had heard nothing of our claims as to infringement, as we sell only to jobbers. We now know every man in the country who handles these slates, and shall notify them all promptly of the reissue of the patent. Then, if they continue to sell, we shall be forced to adopt legal measures."

Many more extracts might be made from these circulars, which appear in the proof, but this is enough to show the spirit in which the defendant attempted to intimidate the complainant's customers from dealing with him, or dealing in the slates manufactured by him; and the proof shows abundantly that much business has been diverted from the complainant by these threats and circulars; that the complainant's business has been seriously injured, and his profits very much abridged by the course pursued in sending out these circulars. The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers, for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and, after the proofs were taken, and the suits ripe for hearing, the defendants voluntarily dismissed them,—the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that said suits were brought in a mere spirit of bravado or intimidation, and not with a *bona fide* intent to submit the question of infringement to a judicial decision.

The defense interposed is—First, that these circulars were mere friendly notices to the trade of the claims made by defendant as to what was covered by the Goodrich patent; second, that a court of equity has no jurisdiction to entertain a bill of this character, and

restrain a party from issuing circulars, even if they are injurious to the trade of another.

I cannot believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law, but that might imply a multiplicity of suits which equity often interposes to relieve from; but the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ.

The effect of the circulars sent out by the defendant Kane certainly must have been to intimidate dealers from buying of the complainant, or dealing in slates of his manufacture, because of the alleged infringement of the Goodrich patent. No business man wants to incur the dangers of a lawsuit for the profits which he may make as a jobber in handling goods charged to be an infringement of another man's patent. The inclination of most business men is to avoid litigation, and to forego even certain profits, if threatened with a lawsuit which would be embarrassing and vexatious, and might mulct them in damages far beyond their profits; and hence such persons, although having full faith in a man's integrity, and in the merit of his goods, would naturally avoid dealing with him for fear of possibly becoming involved in the threatened litigation. The complain-

ant, as I have already stated, was engaged in the manufacture of school slates under the Butler and Mallett patents; the Butler patent being much older than the Goodrich, and the Mallett patent being nearly contemporaneous in issue with the Goodrich patent, under which the defendant was manufacturing. But the proof in this case shows a still older patent, granted to one Munger, in 1860, for a muffled or noiseless slate, which most clearly so far anticipates the patents of both complainant and defendants, as to limit them, respectfully, to their specific devices. But I do not think the fact that complainant was the owner of these patents or operating under them, material to the questions in this case. The defendants claim that complainant's slates infringe the Goodrich reissue patent, and threaten complainant's customers with suits if they deal in complainant's slates. The state of the art to which the Goodrich patent pertains may be examined for the purpose of aiding the court in passing upon the question of defendant's good faith in making such threats, and the state of the art is only material, as it seems to me, for this purpose. The court will not attempt, in a collateral proceeding like this, to pass upon the validity of the Goodrich patent, but will consider, in the light of the proof as to the state of the art, and the proof as to defendant's conduct, whether the defendant made these threats against complainant's customers because he in good faith believed that complainant's slates infringed the patent and intended to prosecute for such infringement, or whether such threats were made solely to intimidate and frighten customers away from complainant, and with no intention of vindicating the validity of his patent by a suit or suits. Instead of going into the courts to test the validity of the Butler patent, or the right of complainant to make the kind of slates he was putting upon the market, the defendant, in a bullying and menacing style, asserts to the trade by these circulars that complainant is infringing the Goodrich patent, and threatens all who deal in complainant's slates with lawsuits, and all the perils and vexations which attend upon a patent suit. The average business man undoubtedly dreads, and avoids, if he can, a lawsuit of any kind, but a suit for infringement of a patent is so far outside of the common man's experience that he is terrorized by even a threat of such a suit. There seems to me certainly good grounds for doubting the validity of the Goodrich patent in the light of the state of the art at

the time he entered the field; and that any lawyer well versed in the law of patents would surely hesitate to advise that the complainant's slates infringed the Goodrich patent, either before or after the re-issue; and the conduct of the defendant in dismissing his suits for such alleged infringement without trial, shows that he did not believe that such infringement could be established.

I am, therefore, of opinion that the complainant has made a case entitling him to the interposition of a court of equity to prevent the issue of circulars, or written or oral assertion, that the slates made by the complainant are an infringement upon the defendant's patent; and a decree may accordingly be entered as prayed in the bill.

NATIONAL LIFE INS. CO. v. MYERS.

(Illinois Appellate Court, 1908, 140 Ill. App. 392.)

FREEMAN, J. It is contended in behalf of appellant that the agreement set up in the bill wherein appellant, in consideration of the withdrawal of an injunction and dismissal by appellee of a bill of complaint then pending, is said to have agreed not to publish an alleged libel, is void; that "the bill does not properly set up a conspiracy;" that the injunction order is void for uncertainty; and that equity has no jurisdiction to enjoin a libel.

So far as they are well pleaded the averments of the bill, for the purposes of this interlocutory appeal, must be taken as admitted. It is urged, however, by appellant's counsel that the correctness of some of the statements made in the publications referred to in the bill, and attached to and made a part thereof, are "nowhere denied." The bill alleges in the most emphatic manner that these publications contain false, scandalous and malicious statements and that they were prepared and circulated with the intent "to destroy the good name, reputation, property and business" of appellee; "for the purpose of attempting to levy blackmail," and for the purpose of "defrauding and injuring" appellee; that the publications contain "divers false, scandalous, malicious and libelous statements concerning your orator, its business, its property and its officers." A number of paragraphs from said publications are set forth in the bill, the statements of which are

specifically charged to be false and to have been published with the intent and for the purpose of injuring appellant in its business. It is averred that by said publications it was intended to create a false impression that appellee's affairs were under investigation by policy holders and others, that appellee had been guilty of crime and violated the penal laws in the management of its business and assets, that its officers are dishonest, have sworn falsely and handled appellee's assets with intent to convert the same to their own use, that appellee is insolvent and has reported fictitious assets, that in four years \$1,600,000 of appellee's assets have been converted to the personal use of officers and directors of appellee, all of which, as well as other like statements, the bill charges, are false and made for the purpose of destroying its business. It is charged that irreparable injury has been done and is being done by these publications for which no adequate remedy exists at law. In view, therefore, of the whole tenor of the averments of the bill, it is difficult to see what bearing the alleged failure to deny a specific statement in some of these publications has upon the question now before us as to the propriety of the interlocutory injunction of which appellant complains.

It is urged that the agreement was void which the bill states appellant entered into, not to publish or circulate thereafter "any false or defamatory written statements or reports about the good name, business, property or stability of "appellee, in consideration of the delivery by appellee to appellant of certain papers in its possession, the dissolution of an injunction against appellant and the dismissal of the bill of complaint upon which such injunction had issued. The contention seems to be that the consideration of this agreement was to the effect that appellant would "not publish or divulge matters in which the public had an interest," and that such agreement is void as against public policy; that "a promise not to do what the law prohibits" is an adequate consideration for such agreement. We are not aware of any rightful or lawful interest the public can have in false or defamatory publications made with intent wrongfully to injure the property and business of anyone. Appellant's contention seems to be to the effect that the contract referred to, which appellant is charged with having violated, was not and is not a valid subsisting contract, for want of a legal consideration, and therefore a court of equity will not and cannot interfere to restrain its breach. There

was, however, other consideration than the agreement by appellant not to publish. Certain papers which appellant evidently deemed of some value were delivered to him as a part of the consideration for the promise. The promise not to publish, apparently therefore, was based on a valuable consideration to appellant. Whether or not, when the evidence is presented, the contract will be deemed one the violation of which should be restrained, is not now the question. . . .

It is further argued that equity has no jurisdiction to enjoin a libel and that the real scope of the bill is "to enjoin the publication and circulation of what is claimed to be a libel." Much space is given by appellant's counsel to discussion of the liberty of the press and to decisions in various jurisdictions to the effect that a "court of chancery will not restrain the publication of a libel because it is a libel." *Prudential Life Ins. Co. v. Knott*, 10 L. R. Ch. App. 142. In the present case it is claimed in behalf of appellee that the injunction in this case does not merely restrain the publication of a libel, as to which there is an adequate remedy at law, but that the fact that the publications complained of are alleged to be libelous is but an incident; that the jurisdiction of equity invoked in the case rests upon other and unquestioned grounds. If a libelous publication is in violation of a valid contract, if it is in pursuance of a wrongful conspiracy to destroy property rights and injure the business of appellee, if the parties issuing the libelous publication are insolvent and no remedy at law exists, if it is inflicting irreparable injury the extent of which cannot be definitely ascertained and for which there is no adequately remedy at law, if the bill shows that not only by publications, but by letters to appellee's agents and employees, appellant is interfering with appellee's business, is seeking to cause policy holders to lapse their policies and to cause its business to be so far ruined as to throw it into the hands of a receiver, and all this wrongfully and with malicious purpose, it is difficult to see why equity should withhold its preventive authority. In *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 429, an injunction was granted, in which, among other things, the said union was restrained "from sending any circular or other communications to customers or other persons who might deal or transact business with said complainants or either of them for the purpose of dissuading such person from so doing." The court said: "The union published weekly what was called a directory of union printing offices of Chicago

containing the names of offices where the demands of the union were submitted to and a list of offices on strike, in which latter list were published the names of complainants. The purpose of this directory was to induce people not to deal with the complainants and to compel employes to leave their service." In that case it was urged on the part of the appellants as ground for demurrer that the relief prayed for would deprive the defendants of rights secured to them by article 11, section 4 of the Constitution, which provides that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The injunction was, however, affirmed. . . .

It is doubtless true, as stated in *Covell v. Chadwick*, 153 Mass. 263, cited by appellant's counsel, that "so far as the bill alleges libel by the defendant on the plaintiff, unless he can show that they are somewhat more than mere false representations as to the character or reputation of his property or as to his title thereto, he is not entitled to a remedy by injunction." In the case at bar the publications are, according to the bill, more than mere libels, and where, as here, the bill distinctly avers essential facts forming the basis of the prayer for relief so as clearly to apprise the appellant of what he has to meet, it is not necessary that it contain the evidence or recite the circumstances in detail which would support its general statement. The present bill is particularly full in this respect. It clearly shows an irreparable damage which would not be adequately compensated by action at law. The injunction does not attempt to restrain a mere libel. It restrains wilful, malicious and irreparable injury to appellee's property rights, for which the bill shows there is no other adequate relief.

Finding no error in the record the interlocutory order granting the injunction will be affirmed.

Affirmed.

MUNDEN v. HARRIS.

(Court of Appeals of Missouri, 1910, 153 Mo. App. 652, 134 S. W. 1076.)

ELLISON, J. This action is stated in a petition with two counts, one for damages for disturbing plaintiff's privacy by publishing his

picture without his consent; and the other for libel in publishing the picture along with false statements attributed to plaintiff. In each count punitive damages were asked, but no special damages were alleged. Defendants demurred to the petition as not stating a cause of action. The demurrer was sustained, and plaintiff refusing to amend, judgment was rendered against him and he appealed.

Plaintiff is an infant five years old and the action was brought through a "next friend" as required by statute. The facts stated in the first count of the petition are that defendants, being jewelry merchants in Kansas City, invaded plaintiff's right of privacy by willfully and maliciously using, publishing and circulating his picture for advertising their business of selling merchandise; thereby destroying his privacy and humiliating, annoying and disgracing him and exposing him to public contempt.

In the second count the facts, after certain preliminary allegations, are stated to be that: "defendants did wrongfully and maliciously compose, print and publish and cause to be composed, printed and published, of and concerning plaintiff, together with his photograph, the following false, defamatory, scandalous and malicious libel meaning thereby, and so understood by persons who saw the same, to impute to plaintiff a falsehood and attributing to plaintiff in said publication, a statement which was false and malicious, to-wit: 'Papa is going to buy mamma an Elgin watch for a present, and some one (I musn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it of Harris-Goar Co., 1207 Grand Ave., Kansas City, Mo. Gifts for Everybody, Everywhere in their Free Catalogue.'"

Picture of Plaintiff .

The upshot of defendants' position in support of their demurrer to the first count, is that there is no right of privacy of which the law will take notice; or, stated differently, their argument is that the law does not afford redress for an invasion by one person of another's privacy unless it is accompanied by some injury to his property or interference therewith; and that the mere printing and publishing one's picture does not and cannot affect his property. The cases principally relied upon by defendants are those of *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538; *Henry v. Cherry & Webb*,

———R. I. ——— (73 Atl. 97) ; and *Atkinson v. Doherty*, 121 Mich, 372; in the first of which, in the course of an interesting opinion concurred in by a majority of the court, is found a course of reasoning which denies that a right of privacy exists which can be protected by a court of equity. That case was a bill in equity to enjoin a mercantile firm from publishing a young woman's picture as an attraction to an accompanying advertisement of a certain brand of flour. The court in denying the right of equity to protect a person thus embarrassed, shows its unfriendliness to the claim in the following language: "The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise."

The conclusion of the court is based much upon the statement that the case there presented was without precedent, and, while admitting that equity, in the beginning and early part of its administration, was made up of growth, case by case, which was without precedent, being based merely upon the conscience of the chancellor, yet there came a time when its growth ceased and what was formerly the personal conscience of the chancellor, became a "juridical conscience," which would only permit relief to be administered in cases where it had been administered before, save in those instances "where there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it, or which by analogy or parity of reasoning ought to govern it." With such consideration as a guiding thought, the court refused relief because there was no precedent for it and it did not appear to be within any recognized legal principle. This view is approved in *Henry v. Cherry & Webb*, which was an action at law in the nature of trespass for damages for an invasion of the right of privacy by using and publishing the plaintiff's picture as an advertisement in aid of the sale of merchandise. In such respect it was like *Roberson v. Rochester Folding Box Co.* Though one was an application in equity for restraint and the other

was for damages at law, yet as each by similar reasoning, denied that there was any such right, both denied any remedy.

The remaining case (*Atkinson v. Doherty & Co.*) was where after the death of John Atkinson, a celebrated lawyer, the defendants, who were manufacturers of cigars, named a brand of their make the "John Atkinson Cigar," and placed the name, together with his picture, as a label on cigar boxes. His widow sought to restrain such acts by injunction. Her right was denied; and again the reasoning in *Roberson v. Rochester Folding Box Co.* was approved. But it will be observed that while the *Roberson* case involved the right of privacy of the plaintiff's own picture, the *Atkinson* case, like that of *Schuyler v. Curtis*, 147 N. Y. 434, sought to protect the right of privacy to the name of a deceased relative, a case which did not call for much that was said in the course of the opinion, concerning the general right of privacy, except by way of argument or illustration; and what was said beyond the right of privacy which may be claimed by relatives of a deceased, must be regarded as dictum. The point of agreement in these cases is that no relief can be had by way of protecting a right of privacy, for the reason that it was not a right of property and did not fall within any legal principle.

But courts which refuse assent to those decisions assert that it is a right of property and that there is such legal principle, old and well recognized; though they concede the case is new in its facts. The main ground for division of opinion in these courts is at last found to be based on those conflicting assertions. So therefore it appears that if it can be established that a person has a property right in his picture, those who now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property.

Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common to every man. One is not compelled to show that he used, or intended to use, any right which he has in order to determine whether it is a valuable right of which he cannot be deprived and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture,

it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. Judge Gray, in his dissenting opinion in *Roberson v. Rochester Folding Box Co.*, supra, said, at page 563 of the report, that: "The proposition is, to me, an inconceivable one that these defendants may, unathorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity."

One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his *own* profit and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?

It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name. Life, liberty and the pursuit of happiness, are rights of all men. The right to life includes the pursuit of happiness, for it is well said that the right to life includes the right to enjoy life. Every one has the privilege of following that mode of life, if it will not interfere with others, which will bring to him the most contentment and happiness. He may adopt that of privacy, or, if he likes, of entire seclusion. The face of the majority opinion in *Roberson v. Rochester Folding Box Co.*, supra, while denominating the right of privacy as "a phrase" and "a so-called right," yet concedes that it is a something which to disturb is an "impertinence." The court recognizes the right, but, as has been already said, not considering it a property right, refused it the protection of the restraining power of a court of equity; and thereby confined the beneficent power of equity within too narrow bounds—bounds so limited as will permit the doing of acts which shock the moral sense.

We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value in that it is one of the modes

of securing to a person the enjoyment of life and the exercise of liberty; and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity, or damages in an action at law. If there are special damages they may be stated and recovered; but such character of damages is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.

It ought, however, to be added that though a picture is property, its owner, of course, may consent to its being used by others. This consent may be express, or it may be shown by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who by a course of conduct, has excited public interest. And it ought also to be understood that the right of privacy does not extend so far as to subvert those rights which spring from social conditions, including business relations. By becoming a member of society one surrenders those natural rights which are incompatible with social conditions. In the nature of things, man in the social organization must be referred to and spoken of by others, and this may be done freely so long as it is free from slander. But the difference between that right and a claim to take another's picture against his consent, or to make merchandise of it, or to exhibit it, is too wide for hesitation in condemning the act and granting proper relief.

The foregoing views find ample support in thoroughly considered cases decided in recent years. (*Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190; *Vanderbilt v. Mitchell*, 71 N. J. Eq. 632; *Edison v. Edison Mfg. Co.*, 73 N. J. Eq. 136; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424.) These cases are supported by the dissenting opinion of Judge Gray, writing for the minority of the court, in *Roberson v. Rochester Folding Box Co.*, *supra*. And we think the principle they announce is practically conceded in *Schuyler v. Curtis*, 147 N. Y. 434, hereinbefore cited. Several of these cases make acknowledgment to a very able article in 4 *Harvard Law Review*, 193.

In the *Schuyler* case a near relative of the deceased, Mrs. Schuyler, sought to enjoin admirers of her many virtues and good deeds from placing her statue in a public place. It was held that relief could not

be had on the ground of the deceased's right of privacy, as that right necessarily died with her. And that so long as no aspersion was intended to be cast upon the dead; so long as the dead were intended to be honored in appropriate manner and not slurred or defamed in such way as to outrage the feelings and sensibilities of surviving relatives, there could be no cause of complaint by them. That the alleged injury, in that case, to the sensibility of relatives was fanciful rather than real, and it was therefore not a subject for interference by the courts.

We will now consider whether a cause of action for libel is stated in the second count. Our statute (sec. 4818, R. S. 1909) declares a libel upon a person to be a thing "made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule. . . ." The printed matter set forth in the petition is the utterance of falsehoods, of a character tending to incite ridicule.

It was argued that the printed matter published consisted of purported utterances of plaintiff which were falsehoods and that to charge one in writing with being a falsifier was libelous per se. We are not inclined to base our decision on that ground, since we believe the statement purporting to have been made by plaintiff was palpably not intended to be understood, and would not be taken to be a false statement of fact, but rather as an imaginary statement attributed to him by defendants for the purposes of advertisement of their goods.

But it seems to us clear that considering the publication of the picture and the printed matter, as a whole, it would expose plaintiff to ridicule and contempt unless his age (to which we will presently refer) would exempt him. It is a public statement of what plaintiff had said about the private affairs of his father in relation to a present for his mother, and is a reference to the private social affairs of his sister. Connecting these statements with his picture and using them as an advertising aid to business was necessarily bound to cause him to undergo the vexation and humiliation of ridicule though it was not believed he had really made the statements. It does not require any imagination to realize what a suggestive handle it would give to the teasing propensities of his fellows, to be used by them without stint and without regard to his distress. What right had these defendants to thus wrong him? It would be a matter of regret if the law did not

afford him a remedy and such an one as would probably prevent repetition. The extreme to which Judge Parker went on the right of privacy in *Roberson v. Rochester Folding Box Co.* did not lead him to say that a party was altogether without remedy. At pages 556 and 557 of the report he concedes that libel could be maintained.

But we are not left to a mere concession. The case of *Pavesich v. New Eng. Life Ins. Co.*, *supra*, like that at bar, was instituted by petition in two counts, one for damages for an invasion of the right of privacy by publishing the plaintiff's picture in connection with an advertisement wherein he was said to have uttered language in advancement of the business advertised, and the other for libel. The opinion of Justice Cobb is not only an able and exhaustive consideration of the remedy in equity for restraint and at law in damages, for an invasion of the right of privacy, but it includes a distinct and separate affirmation of the right to maintain libel; and that in a case of the kind we have now before us the matter was such that if found by a jury to be untrue, would have been libelous per se and no special damages need be alleged. So it was determined by the Supreme Court of the United States, that the publication of a woman's picture in connection with an advertisement of whiskey was a libel which might work serious harm to her standing with some portions of the community. (*Peck v. Tribune Co.*, 214 U. S. 185, overruling the same case in 154 Fed. Rep. 330.)

The plaintiff is an infant only five years old, which facts brings a subject into the case deserving serious consideration. Can an infant be slandered or libeled?

The question is easily answered in the affirmative, yet the answer involves the further consideration whether it should not be qualified by way of exception. It seems well settled that an infant is liable for his torts, among which are libel and slander. (*Fears v. Riley*, 148 Mo. 49; *Jennings v. Rundall*, 8 T. R. 335; *Starkie on Slander*, sec. 347.)

But that statement cannot be accepted broadly. For malice and evil intent are necessary ingredients in these torts and therefore sometimes the age of the infant may become of the highest importance in determining his liability. If he be of such immature and tender years that he cannot form malice or entertain conscious evil intention, he cannot be guilty of either libel or slander. It would be a ridiculous

statement to say that a prattling child, two or three years old, could slander or libel another. It would be almost, if not quite, as ridiculous to say that an infant twenty years old could not entertain malice so as to be guilty of these wrongs. Where, then, is the line to be drawn? We think the rule in criminal cases applies, for they and libel and slander have malice for a common ingredient. *Doli incapax* finds place in the consideration of the question. An infant is not liable to an action of slander "until he is *doli capax* 'capable of mischief'—which, presumptively is not until he is fourteen years of age." (Tyler on Infancy, sec. 127; Newell on Slander and Libel, 370; Odgers, Libel and Slander (star page) 353.) The rule at common law, in force in this state (*State v. Tice*, 90 Mo. 112) is that a child under seven years of age is *doli incapax*—incapable of committing a crime; and between that age and fourteen he may or may not be: over fourteen he is as an adult. And so if he is under seven he should be considered incapable of libel or slander. These wrongs are indictable in this, and many other countries, as state offenses, and it would be an inconsistency to be avoided, if possible, to say, as a matter of law, in one forum, that the child could be capable of the act, and in the other that he could not.

It is not inconsistent with, nor an objection to, this view that a child of tender years may commit a trespass and be civilly liable for damages. *Doli capax* cuts no figure in that instance for a trespass does not necessarily imply malice, or evil intention. So a boy under seven years, was held liable for breaking down shrubbery and destroying flowers. (*Hutching v. Engle*, 17 Wis. 237.) And Judge Cowen, in *Hartfield v. Roper*, 21 Wend. 1. c. 621, cites a case where an infant only four years old was stated to be liable in trespass. But in such extreme instances it is conceded that punitive damages could not be had; this, on the ground that wantonness or malice could not be imputed.

Though in some degree allied to the point in discussion, it is not necessary for us to say at what tender age, arbitrarily fixed, an infant would not be liable for fraud, but manifestly, there is a period of immaturity when he could not be guilty of wrongful deception. Clearly he should be of such years of discretion that such a wrong could be fairly charged to him. In *Watts v. Cresswell*, 3 Eq. Cas. Abr. 515 (9 Vin. Abr. 415) it was said that "if an infant is old enough to con-

trive and carry out a fraud, he ought to make satisfaction for it." Which is but another mode of saying that unless he has sufficient years of discretion to invent and perpetrate a fraud, he could not be held to have committed one.

Though, as thus shown, a child of tender years be incapable of uttering a slander or publishing a libel, it does not follow that he may not be slandered or libeled. The two positions are not dependable upon one another. In some instances and in some stages of infancy, opprobrium could not affect a child. Much would depend upon the nature of the offensive imputation. If an infant at the breast of his mother was charged with being a thief, it probably would not be slander, since it is not possible for him to commit larceny, either in point of fact or point of law. But if such infant should be charged with being afflicted with a loathsome and permanent disease, or with a private and humiliating physical malformation, these are charges which could be true and furthermore, they are species of defamation which would grow and the harmful effect of which would increase with the passing of time, and we can see no reason why it would not be slander. It has been decided that the fact that an infant is too young for criminal responsibility will not bar him of his action against his traducer. (*Stewart v. Howe*, 17 Ill. 71.) By the statute of Illinois the common law criminal irresponsibility for crime was raised from seven to ten years in cases of larceny, and a girl of age between nine and ten was charged with being "a smart little thief." The defendant sought to escape liability on the ground that she could not commit the crime of theft. The judge delivering the opinion became heated and indignant and characterized the defendant as a "reputational infanticide," and said that he "would sooner see the action abolished than to read out infancy from the pale of its protection."

The foregoing is sufficient for an understanding of our views in relation to plaintiff's liability to be wronged, or, if it may be so expressed, his capacity to be injured. In our opinion, notwithstanding he was but five years old, he was liable to the ridicule of his fellows. His susceptibility to vexation and humiliation was at hand and his appreciation of the outrage committed by defendants would grow in greater proportion than would the failure of memory in his associates.

It is well enough to add that a trial may disclose that plaintiff was less than five years old; and so much less as not to be the subject of

ridicule, or contempt, or public hatred by any appreciable number of the community (*Peck v. Tribune Co.*, *supra*). If so, then, under the views we have expressed, he was not libelled. It may be that his years and his intelligence were such that to be subject of ridicule, contempt or hatred would be a matter over which persons would differ, in which event the question could not be withdrawn from a jury, but would be for their consideration as to the law and the fact, as is proper in libel.

The result of the foregoing consideration is to reverse the judgment and remand the cause for trial. All concur.

SECTION XI. INTERFERENCE WITH DOMESTIC, SOCIAL AND POLITICAL RELATIONS

EX PARTE WARFIELD.

(Texas Court of Criminal Appeals, 1899, 40 Tex. Crim. 413.)

HENDERSON, J. This is an original application for a writ of habeas corpus, which grew out of contempt proceedings in the Forty-fourth Judicial District Court of Dallas County. It appears that Will R. Morris, as plaintiff, brought a suit against J. B. Warfield, as defendant, before Judge Richard Morgan, in the Forty-fourth Judicial District Court of Texas, for \$100,000. The petition alleges a number of acts on the part of J. B. Warfield, the defendant in that suit, interfering with marital relations existing between Will R. Morris and his wife, Vivia Morris, said acts causing a partial alienation of the affections of his said wife; and further suggesting that the course of conduct of said Warfield towards the wife of said Morris, if permitted to continue unrestrained, would likely culminate in the total alienation of the affections of his said wife, and the destruction of the marital relations existing between them. And said Morris asked for a writ of injunction restraining said Warfield from visiting or associating with plaintiff's said wife, or going to or near her at a certain house, No. 129 Marion Street, or any other house or place in the city of Dallas, or

State of Texas, where his said wife might be, and that he be restrained from writing or speaking to her, or in any manner, either directly or indirectly, communicating with her, by word, letter, writing, sign, or symbol, and also asking that his agents and employes be restrained from the like, etc.; and that said Warfield and his agents and servants be restrained from interfering with plaintiff in his peaceful efforts to seek, talk, write or communicate with his said wife, etc. The writ was granted on the 23d of February, 1899, and was served on Warfield on the following day, the 24th of February. On the 9th of March following, plaintiff sued out an attachment against said Warfield, alleging that he had violated said writ of injunction, and made a motion for rule against him for contempt for a violation thereof. . . .

Now, recurring to the subject matter of this litigation, as set forth in plaintiff's petition, we think there can be no question that appellant sets forth a cause of action for the partial alienation of his wife's affections. The marital relation existing between these parties was a civil contract, binding, until it should be abrogated, upon both of the spouses. "He is entitled to the society of his wife, and may sue for damages any person enticing her away from him; and, whenever a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie." See 2 Lawson, Rights, Rem. and Prac., sec. 714. "It is legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes upon her husband because of the marital relation, and her obligation to render family service is coextensive with that of her husband to support her in the family." *Id.*, sec. 715; Schouler, Dom. Rel., sec. 41; *Bennett v. Smith*, 21 Barb., 439; *Barnes v. Allen*, 30 Barb. 663. A husband, from time immemorial, has an interest in the services of his wife, springing from the marital relation. In this State suits for personal injuries to her must be maintained by the husband predicated upon this idea. The suit here was brought for damages on an alleged partial alienation of the affections of his wife, and it was averred that, on account of the past conduct of the defendant in that suit, plaintiff was apprehensive, and had just grounds to fear, that, by a continuance thereof, the wife's affections would be entirely alienated. There would consequently be a breach and destruction of the matrimonial contract existing between the parties, by which plain-

tiff would entirely lose the affections and services of his said wife. These, it must be conceded, were of a peculiar value to plaintiff; and it would seem that, if the court had the power to maintain this suit for damages on account of the partial alienation of the affection of his said wife, he would have a right to invoke the restraining power of a court of equity to prevent the utter alienation of his wife's affections and the utter destruction of the marital agreement. We believe this would be so under the liberal rules of equity, as now practiced in the courts, but much more so under the provisions of our statute on the subject of injunctions. Article 2989, Revised Statutes, provides that the judges of the district courts may grant writs of injunction in the following cases: "(1) Where it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the appellant." This provision shows that it was intended to be broader than the ordinary authority, because, in the third subdivision of the act, the court is authorized to grant the writ in all other cases where the applicant for said writ may show himself entitled thereto under the principles of equity. For a construction of these provisions, see the able opinion of Judge Denman of the Supreme Court in *Sumner v. Crawford*, 91 Texas, 129. After reciting the provision of the statute, the learned judge used this language: "It will be observed that the latter portion of the article requires the case to be brought within the rules of equity, and does not undertake to state the circumstances entitling the applicant to the writ, and therefore, under it, it must appear that there is no 'adequate remedy at law,' as that term has always been understood. But the first portion of the article does state what facts will justify the issuance of the writ thereunder, and does not require that there shall be no adequate remedy at law." And we would further suggest that the question decided in said case is very much in point in this case, as showing the liberality of our courts in granting writs of injunction. The court below, it will be conceded, had jurisdiction and authority to maintain the suit, and it can not be seriously questioned that the principal object of the suit was to preserve the marital relations existing between plaintiff and his spouse, and to conserve, as far as may be, and rehabilitate, her affections for the plaintiff. It was claimed, by the continued conduct and interferences of the defendant in that suit, that the integrity of the marital relation was

threatened, and, if his course of conduct was suffered to continue, that the marital relation would be destroyed. Among other things, it was alleged that said defendant exercised an undue influence over the wife of plaintiff, and, if suffered to associate with her and speak and talk with her, and visit her, it was very likely he would entirely corrupt and lead her astray, and therefore the power of the court was invoked to arrest these interferences, and defendant was enjoined from speaking or talking with her, or visiting the house where she was staying. It occurs to us, if the suit itself was maintainable, that the acts complained of were prejudicial to the plaintiff; indeed, that, by their continuation, the real object of the suit would be entirely frustrated; and that the court consequently had the power and authority to inhibit said defendant from interfering with plaintiff's wife, and that this was no interference with the inalienable rights of the citizen to go where he pleased, and to associate with whom he pleased, and to pursue his own happiness in his appointed way, provided such course of conduct did not interfere with another's right. "He had a perfect right to so use his own as not to abuse another's." Nor is there any inconsistency, when thus construed, between the freedom of speech and of the press and the integrity of the marital relation. The law is as much bound to protect the one as the other, and, when both can be construed in harmony, it is the duty of the courts to protect both.

It has been said that applicant was not shown to have violated the spirit of the injunction, inasmuch as no conversation was shown of a character calculated to persuade or lead away the wife of the plaintiff; but his conduct was certainly in violation of the letter of said injunction, and we can not say that the court did not have the right and authority to make the injunction as broad as it did, as, under the allegations of the petition, it is shown that defendant was not to be trusted in the society of Mrs. Morris, or to speak with her.

But, even if it be conceded that the act of the court in this regard is of doubtful validity,—that is, that it may or may not be void,—still we do not feel inclined to interfere. The defendant in that suit had his right to invoke the action of that court to dissolve that injunction. He did not do so, but he saw fit to willfully disregard it, and he now claims before this court that the same was absolutely void, and that he had the right to defy it and set it at naught. It occurs to us that the injunction could have been easily obeyed, without infringing upon

any of the fundamental rights of the applicant. We accordingly hold that the applicant does not show himself entitled to be relieved. It is therefore ordered that he be remanded to the custody of the sheriff of Dallas County, and undergo the sentence imposed upon him by the judge of the Forty-fourth Judicial District Court. It is further ordered that the costs incurred in this court be taxed against the applicant.

Relator remanded to custody.

ENGLE v. WALSH.

(Supreme Court of Illinois, 1913, 258 Ill. 98, 101 N. E. 222.)

VICKERS, J. Charles F. Engle filed a bill in the circuit court of Cook county against the Amalgamated Sheet Metal Workers' Labor Union No. 73, International Alliance, (hereinafter referred to as the union), and Thomas Redding, president, Thomas Walsh, business agent, and other persons, officers and members of committees and boards of the union, for an injunction restraining the defendants from enforcing, or attempting to enforce, a fine which had been imposed upon the complainant by said union for an alleged violation of the rules of the union for the alleged misuse of the union label on non-union furnace stacks. . . .

From the foregoing statement, which embodies all of the material allegations of the bill, it is apparent that plaintiff in error is seeking to invoke the jurisdiction of a court of equity in a controversy that has arisen between him and the union of which he is a member. The rights, if any, which plaintiff in error is seeking to enforce are such as he has acquired by reason of his membership in the union. He seeks to retain his status as a member, with all rights incident thereto, without the payment of the fine which has been imposed upon him by the legally constituted authorities of his union. It is not charged that the hearing before the executive board was wanting in any requirement prescribed by the rules of the union. The effect of the allegation on this point is that plaintiff in error was erroneously and wrongfully convicted, and he appeals to a court of equity for the purpose of having the wrong redressed. The courts have frequently been called upon to restrain voluntary associations, such as churches,

lodges of various kinds, boards of trade, and the like, from expelling members for an alleged violation of some rule or regulation of the association, and in such cases this court has uniformly refused to sanction the practice of calling on a court of equity to adjust disputes arising between such associations and its members, and in the board of trade cases that have come before this court it has refused jurisdiction of the controversy on the ground that the remedy of such member, if he has any, is in a court of law. (People v. Board of Trade, 45 Ill. 112; People v. Board of Trade, 80 id. 134; Baxter v. Board of Trade, 83 id. 146; Sturges v. Board of Trade, 86 id. 441; Board of Trade v. Nelson, 162 id. 431; Green v. Board of Trade, 174 id. 585.) In People v. Board of Trade, 80 Ill. 134, on page 137, it was said: "The board of trade, so far as we can see, is only a voluntary organization, which its charter fully empowers it to govern in such mode as it may deem most advisable and proper. It has adopted its by-laws, provided a forum for their enforcement, which has acted thereunder, and the court will not interfere to control its action." In churches, lodges, labor unions, and other like voluntary associations, each person on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization. (Bostedo v. Board of Trade, 227 Ill. 90.) Courts will not interfere to control the enforcement of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government. The case presented by plaintiff in error in his bill must fall, we think, within the rule announced in the foregoing authorities. . . .

Recurring again to the averments of the bill, it will be noted that plaintiff in error has made no attempt to set out the by-laws, rules and regulations of the union, nor is it charged, even in general language, that his trial was contrary to the prescribed procedure for such hearings. It does appear from the bill that a formal charge was lodged against him, that he had written notice of the time and place when and where a hearing would be had, and that he appeared before the executive board and participated in the hearing. He presented his side of the controversy to the board. Since it is not averred in the bill that this board was not the proper tribunal to hear the charge nor that its proceedings were contrary to the provisions of the

rules of the union, it must be assumed that the hearing was before the proper authority and that the proceedings were conducted in conformity to the prescribed rules. This being true, it cannot be said that the executive board had no jurisdiction to hear said charge. Jurisdiction is by legal implication admitted by plaintiff in error: Plaintiff in error having failed to set out the by-laws and regulations of the union, we do not know whether he had exhausted all of his remedies, by appeal or otherwise, within the union. If there is a by-law permitting plaintiff in error to appeal to some reviewing body from the decision of the executive board, clearly he would have no standing, in any event, in a court of equity until he had exhausted the remedies provided by his association for the redress of his supposed grievance. The bill was clearly defective in failing to show what the by-laws and regulations of the union are, since without them no court can determine what the rights of the member are. The bill is also defective in that it fails to show a want of jurisdiction or a case of such irreparable injustice and hardship as to warrant the interposition of a court of equity.

KEARNS v. HOWLEY.

(Supreme Court of Pennsylvania, 1898, 188 Pa. 116, 41 Atl. 273.)

Bill in equity for an injunction against the chairman and secretary of the democratic county committee of Allegheny county. . . .

DEAN, J. The members of the democratic county committee of Allegheny county by the rules of the party are elected at the primary elections on the last Saturday of August in each year. By Rule VII. the election officers must certify the vote for each candidate to the executive committee of each ward, borough and township, and also to the chairman of the county committee. The election of the delegates who are to compose the county convention to nominate candidates for county offices are elected at the same time, and the convention meets the following Monday or Tuesday. Rule VII. having provided for certification of the vote to the county chairman, Rule VIII. provides that "a list of the county committee so elected shall be prepared by the chairman, and announced at the county convention."

By Rule X. the county committee so chosen must meet the first Monday of April following, and elect a chairman to serve for the ensuing year. The defendant, Joseph Howley, had been elected chairman on the first Monday of April, 1897, and therefore was chairman in August of that year at the county convention. He announced the members elect to the county committee, so far as returns had been received. Quite a number of districts had not certified the election of members of the committee; these were announced as vacancies to the number of 258, out of a roll of 521. The chairman, Howley, at the proper time, called a meeting of the county committee, as provided in Rule X., for the first Monday of April, 1898; he was a candidate for re-election as chairman. The bill filed the Thursday before the meeting averred that in a large number, 258, of the districts announced as vacant, no duly elected committeeman had been certified; that Howley, in violation of the rules, had already filled vacancies with names of persons not elected, and was about to complete the roll with names of others appointed by himself; further, that he had erased from the roll the names of duly elected members, and was about to wrongfully appoint others. The prayer of the bill was that Howley be restrained by injunction from erasing names, and that he be enjoined from filling vacancies, or in any way tampering with or interfering with the roll. The defendants made no answer, but contented themselves with denying the jurisdiction of the court. After hearing testimony, the learned judge of the court below found the material facts averred by plaintiff to be true, and as a conclusion of law that the court had jurisdiction to entertain the bill and grant relief; therefore, he entered a decree restraining the defendants or either of them from adding names to the roll upon any pretense, or striking therefrom names, and annexed to the decree a roll of those whose names should properly appear thereon. Thereupon defendants bring this appeal and assign for error want of jurisdiction in the court.

We see in the evidence no reason to question the correctness of the court's finding of fact. Howley probably filled the vacancies with the names of democrats personally agreeable to himself, and it is by no means incredible they accorded with him in his ambition to continue himself in office. His opinion was that, by virtue of his office, he had power to fill the vacancies, and it is not clear that he was wrong in this opinion. However this may be, if he usurped the power or

wrongfully exercised it, he was amenable to his party, which could dethrone him and visit him with political penalties. But the question here is, has a court of equity jurisdiction at the instance of dissatisfied members of the party or committee to correct and make up the roll, and force warring democrats to associate with each other, when they are averse to such associations.

It is clear to us that no property right in plaintiffs or in others as members of the county committee existed. As a purely political committee it neither owned nor pretended to own or to derive any benefit from anything of value held by them in common. That money for legitimate election expenses was contributed by democrats to the committee, and by the members paid out, gave the one who handled the share put in his possession no personal ownership in it. He could derive honestly no personal benefit from the fund, and consequently had no property right. Such a duty, would be a very "dry trust," if honestly executed. But the learned judge of the court below was of opinion that, even if membership of the committee conferred no property right, nevertheless, under the act of June 16, 1836, which confers on the common pleas the jurisdiction and powers of a court of chancery in "The supervision and control of all corporations, other than those of a municipal character, and unincorporated societies or associations and partnerships," he had jurisdiction to entertain the bill and found thereon his decree. We have more than once decided that this act gives to the courts only the powers of the English court of chancery. See *Kneedler v. Lane*, 3 Grant, 523, where Justice Strong fully and clearly construes the act, and so pronounces. The English chancellor has always disclaimed authority to interfere with the action of voluntary and unincorporated associations where no right of property was involved: *Rigby v. Connol*, L. R. 14 Ch. Div. 482. We will not cumber this opinion with further citations from the English reports to sustain this view, for it is scarcely questioned by counsel for appellee. The court below we think was misled into claiming for the courts of Pennsylvania enlarged chancery powers, because of the tendency of our late legislation to regulate primary elections and prevent fraud and corruption by the election officers. It may be, if this bill had aimed to prevent a threatened violation of law by any of these officers, it could have been maintained. But there is no statutory injunction or prohibition directed to chairmen and secretaries of county committees; they are amenable alone to their

party, which is purely political. The authority of the courts in such a case is thoroughly discussed by the New York court of appeals in *McKane v. Adams*, 123 N. Y. 609. In that case McKane filed a bill to enjoin the democratic committee of Kings county from deying his membership. The court dismissed it, saying in the course of an elaborate opinion: "His status therefore is that, though his town association elected him as a delegate to the general committee of the county organization, the members of that body have refused to admit him to association with them in their office. And if they would and will not associate with him, upon what reasoning or principle should they be compelled to, and the aid of a court of justice invoked? The right to be a member is not conferred by any statute; nor is it derivable as in the case of an incorporate body. It is by reason of the action and of the assent of the members of the voluntary association that one becomes associated with them in the common undertaking, and not by any outside agency or by the individual's action. Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member or to confirm his election, he was remediless against that refusal. No rights of property or of person were affected, and no rights of citizenship were infringed upon.

We adopt this language as expressing our opinion in this case, without referring to and citing the many cases to which counsel on both sides have called our attention, for none of them is of such authority as to move us from our previous decisions. The constitution and statutes of the commonwealth guarantee to all citizens the right of self-government by protecting them in the exercise of the elective franchise for all officers voted for at state and local elections; and lately, the law has gone further, and has so far recognized political parties as to pass an act prescribing the duties of officers at primary elections, and imposing severe penalties for misconduct. But beyond this, political parties and party government are unknown to the law; they must govern themselves by party law. The courts cannot step in to compose party wrangles, or to settle factional strife. If they attempt it, it may well be doubted whether they would have much time for anything else.

We reverse the decree and direct that the bill be dismissed at costs of appellee.

CHAPTER IV. PREVENTION OF CRIMES AND CRIMINAL PROCEEDINGS

POWERS v. FLANSBURG.

(Supreme Court of Nebraska, 1911, 90 Neb. 467, 133 N. W. 844.)

Three citizens and property owners in the village of Trenton began this action in the district court of Hitchcock county to enjoin the defendant from "conducting or in any manner operating and keeping open" a pool and billiard-hall in the village of Trenton. The finding and judgment were for the defendant, and the plaintiffs have appealed.

The petition alleges that the defendant's license has expired, and that he conducts the business complained of without a license; that he keeps and sells intoxicating liquors in his place of business without any license so to do, and allows drinking and swearing in his place of business, and in various ways keeps and maintains a disorderly and disreputable house, which has become and is a public nuisance. A large amount of evidence was taken, many citizens were called as witnesses, and the evidence in regard to the manner of keeping and conducting the business is somewhat conflicting, but there is evidence tending to prove that the defendant is keeping and selling intoxicating liquors contrary to law, and maintaining a disorderly house, and doing other illegal and improper things complained of in the petition. It is stated in the brief that the village council was enjoined by the district court from repealing the ordinance which provided for licensing billiard-halls, and that prosecutions were begun against the defendant for keeping and selling intoxicating liquors without license, and that these actions have been allowed to remain in the courts without determination, and that the courts and the officers of the law are preventing the good people of the village of Trenton from enforcing the law and from putting a stop to the unlawful actions and conduct of the defendant.

The evidence shows that an action was begun by this defendant in the district court to enjoin the village council from enacting an ordinance repealing the ordinance under which he was licensed, and in that action a temporary injunction was allowed as prayed, but the evidence does not show what became of these proceedings, nor whether the action was promptly tried or was unduly delayed. The evidence also shows that a complaint was made against this defendant in the county court of Hitchcock county, charging him with unlawfully keeping intoxicating liquors with intent to sell or dispose of the same contrary to law, and that a warrant was issued, under which a search was made of the premises and certain liquors found and the defendant arrested, and that a hearing was had before the county court, and that the defendant was held to the district court for trial, and a judgment entered by the county court ordering the liquors to be destroyed. The defendant in that action then gave bond for his appearance in the district court and for an appeal to the district court from the judgment ordering the destruction of the liquors. The evidence does not show what was done in this matter in the district court. There is no evidence tending to support the statements of the brief criticising the courts and officers of Hitchcock county.

If we consider only the allegations of plaintiffs' petition and the evidence which they introduced, it appears that the defendant has been guilty of various crimes as charged in the petition, and that he is violating the criminal law in many particulars. There seems to be a great diversity of opinion in regard to these matters as disclosed by the evidence, and we do not find it necessary to determine the preponderance of the evidence under the issues presented. The trial court made no special findings of fact. There is nothing in the petition or evidence to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he had committed, if indeed the defendant is guilty as alleged. The petition does not allege any special interest of these plaintiffs in these proceedings, as distinguished from the interest of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all of the citizens of Trenton who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained. If the defendant persists in keep-

ing and selling liquors without license at his place of business in Trenton, the criminal law is amply sufficient to punish such offenses. If the proper officers refuse or neglect to enforce the law, a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action. If the village authorities were improperly enjoined by the district court, the remedy is by appeal, and a review of those proceedings cannot be had in another and independent action. The plaintiffs have failed to allege or prove sufficient grounds, or, in fact, any necessity, for the extraordinary writ of injunction; nor have they shown any special interest, as distinguished from the interest of the general public.

The judgment of the district court is affirmed.

DAVIS ET AL v. THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

(New York Court of Appeals, 1878, 75 N. Y. 362.)

EARL, J. The plaintiffs allege in their complaint that in January 1873, they were engaged extensively in the business of slaughtering hogs, in the city of New York; and they describe the manner in which they conducted their business, claiming that they slaughtered the hogs by the most approved, expeditious, humane and painless methods; and they allege that the defendant Bergh, the president of the defendant, The American Society for the Prevention of Cruelty to Animals, came to their place of business, and announced to them and their employes that they must discontinue slaughtering hogs by the methods then used, and thereupon arrested the plaintiff Crane and one of such employes for alleged cruelty to animals, and threatened that he would return in one week, and if he then found the plaintiffs or others carrying on said business, in the same way, he would arrest all persons engaged in it and stop the business, as often as he found plaintiffs conducting it in that way. They then allege the extent and character of their business and facts showing that if Bergh should carry his threat into execution they would suffer great damage, for

which no adequate remedy could be had in actions at law, a multiplicity of which would have to be instituted at great expense. They further allege that they are informed and believe that Bergh claims to have authority to interfere with and stop plaintiffs' business, under pretense of cruelty to the hogs slaughtered, and that they are apprehensive that unless restrained he will endeavor to carry his "threats into execution, and will continually interfere with and arrest plaintiffs and their employes, and stop said business so long as plaintiffs carry it on in the manner aforesaid;" and they pray judgment perpetually restraining the defendants and their agents "from interfering with plaintiffs in their business in any way or manner whatever and from interfering with their agents and employes while engaged" in such business. They do not allege that there is no valid law under which the defendants can act to prevent cruelty to animals, or that the defendants are not authorized to prevent such cruelty; but the claim put forth is that the plaintiffs do not practice any cruelty to the hogs and they thus tender an issue of facts as to their guilt or innocence of the crime alleged against them.

The defendants, in their answer, take issue with the plaintiffs, and allege, among other things, that the methods adopted by plaintiffs for slaughtering the hogs are cruel and are attended with needless torture and torment; and that Bergh went upon plaintiff's premises, at the time mentioned as an officer of the Society for Prevention of Cruelty to Animals, without any malice towards plaintiffs, and for the sole purpose of enforcing the laws of the State enacted to prevent such cruelty.

Upon the trial, the plaintiffs gave very positive evidence tending to show that they did not practice needless cruelty upon the hogs slaughtered, and also to show the allegations in their complaint as to the manner in which they would be greatly damaged by the threatened interference of the defendants. They also proved that the defendant Bergh came to their premises, as alleged, and announced that they must cease to slaughter the hogs in the manner then in use, and that he should return in a week, and if he found them slaughtering the hogs in the same way, he would arrest every man engaged. He made no threats to break up or stop their business,—but simply that he would make the arrest. . . .

Hence it cannot be disputed that Bergh was acting under a valid law and regular authority, and that he had the right to make the threatened

arrests, if the plaintiffs were actually engaged in violating the law to prevent cruelty to animals. The only question for contestation was whether, as matter of fact, they were guilty or innocent of such violation; and the determination of that question could not, by such an action as this, be drawn to a court of equity. Whether a person accused of a crime be guilty or innocent, is to be determined in a common law court by a jury; and the people, as well as the accused, have the right to have it thus determined. If this action could be maintained in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest: and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy house, or for violating the excise laws, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria*, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risks of such damage by being a member of an organized society and his compensation for such risks may be found in the general welfare which society is organized to promote.

This action is absolutely without sanction in precedents or principles of equity. It is impossible, in a general way to define the cases in which courts of equity will intervene by injunction to prevent irreparable mischief. They will sometimes enjoin public officers, who are attempting to act illegally or without competent authority, to the injury of the public or individuals. As was said by Allen J. in *The People v. Canal Board*, 55 N. Y., 390: "That public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public or to the injury of individual rights, cannot be questioned." But the case contemplated by that learned judge was not one like this, where a public officer, acting in good faith, under competent authority, was threatening to arrest persons accused of crime, for the purpose of taking them before the proper tribunal for trial upon the question of their guilt

or innocence. The administration of the criminal law would be greatly paralyzed, if no criminal could be arrested until it could be infallibly ascertained that he was guilty of the offense charged. The case nearest in point for the plaintiffs is that of *Wood v. The City of Brooklyn* (14 Barb., 425). It is but a Special Term decision and yet it is by an able judge; and I will refer to it only to point out more clearly a distinction which I make. There an injunction was granted to prevent the enforcement of a void ordinance of the city of Brooklyn. Without determining whether that case was properly decided, it is widely different from this. If here, the law, under which Bergh was acting, had been wholly void, or if he had been wholly without authority to act under the law, then this case would have been analogous to that. But that case would have been widely different, and certainly have required a different determination, if the ordinance had been valid, and the sole question had been whether or not the plaintiff was guilty of its violation. It is therefore unnecessary to determine, in this case, whether the plaintiffs were, as matter of fact, guilty of violating the law; and for the reasons stated, the judgment must be affirmed, with costs.

BISBEE v. ARIZONA INS. AGENCY.

(Supreme Court of Arizona, 1912, 14 Ariz. 313, 127 Pac. 722.)

Ross, J. This is an action of injunction instituted by appellees to restrain the city of Bisbee and its marshal from enforcing the terms of an ordinance of said city requiring fire insurance agents to pay a quarterly license before transacting any business, and prescribing penalties for its violation. The complaint alleges the invalidity of the ordinance, irreparable injury not susceptible of estimation, and a multiplicity of suits. The appellants demurred to the complaint for insufficiency in that it shows upon its face an adequate remedy at law.

As a general rule, the equity side of the court may not be invoked when the complainant has a plain, speedy, and adequate remedy at law. An examination of the complaint, with a view of ascertaining from its allegations whether it discloses that the appellees had an adequate remedy at law, is necessary. For a violation of the terms of the

ordinance, the natural course, and the one provided by law, would be the arrest and trial of the transgressor in the municipal courts of the city of Bisbee. In that court and the superior court of Cochise county and the supreme court to which appeals may be had, the validity of the ordinance can be tested. The remedy ordinarily for such cases is in the criminal side of the courts, and we must presume the courts will declare the law, and, if the ordinance is found to be void, so adjudge it. Should it, however, be found invalid, the defendants would be in no worse position than if found innocent of violating a valid law. A party charged with crime has as much right to ask that equity pass upon the question of his innocence as to ask that equity pass upon the validity or invalidity of the statute or ordinance denouncing the crime. The inapplicability of the writ of injunction to cases of this kind can be very forcibly illustrated by this case. Had the trial court found the ordinance valid, it could pronounce no judgment of conviction. The matter would have to be relegated to the courts of proper jurisdiction and the issue there tried out. Had the court found the ordinance void, its judgment would become final, but no one will contend that equity should take cognizance to declare an ordinance void and not to declare it valid. Should the ordinance be found valid upon a prosecution for its violation, the appellees cannot complain, no matter how it may affect their business. If it is invalid, that becomes a matter of defense to be interposed in the criminal prosecution.

"The legality or illegality of the ordinance is purely a question of law, which it is competent for a court at law to decide. We cannot assume that the courts in which the validity of the ordinance is presented will not decide this question correctly. . . . The legal presumption is, that every court will decide questions presented for determination properly, and conduct proceedings before them fairly and impartially (*Wolfe v. Burke*, 56 N. Y. 115), so that it is at once apparent that the main question upon which appellee relies, namely, the invalidity of the ordinance, can be presented and determined in any action which may be instituted against him for the violation of this ordinance; and as the law is well settled, by numerous well-considered cases, that, as a general rule, a bill in equity will not lie to restrain prosecutions under municipal ordinance upon the mere ground of its alleged illegality, for the obvious reason that the party prosecuted thereunder has a complete remedy at law, because he can avail himself

of such illegality as a legal defense in prosecutions thereunder (*Poyer v. Village of Des Plaines*, 20 Ill. App. 30; *Levy v. City of Shreveport*, 27 La. Ann. 620; *Dillon on Municipal Corporations*, secs. 906, 908, note; *High on Injunctions* sec. 1244), it follows that the averment in the bill of appellee, that the ordinance of which he complains is invalid, is not, of itself, sufficient to entitle him to the relief granted by the lower court." *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624.

The injury complained of may or may not follow a prosecution of appellees. Should the court trying the case declare the ordinance void, no considerable injury would result, and, should it find the ordinance valid and inflict punishment for its violation, it would be performing a plain duty, and, while the result might be very injurious to the appellees, the injury would be just what the law intends as a punishment for its transgression.

A multiplicity of suits may easily be avoided and could not follow, unless the appellees, pending the determination of the legality of the ordinance, choose to run the risk of repeating their acts. A temporary suspension of their business as insurance agents during the time required to test the validity of the ordinance in the law side of the courts is not as important to them as it is to the general public that the usual and ordinary procedure common to all offenses be followed. As was said in *Davis v. American Society for the Prevention of Cruelty to Animals*, 75 N. Y. 362: "If this action could be maintained in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy-house, or for violating the excise law, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria* unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risk of such a damage by being a member of an organized society, and his compensation for such risks may be found in the general welfare which society is organized to promote."

We do not wish to be understood as laying down an unbending rule to the effect that equity will never interfere and restrain the enforcement of ordinances criminal in their nature, for, as was said by Mr. Justice Field in *Re Sawyer*, 125 U. S. 200, 222, 31 L. Ed. 402, 8 Sup. Ct. Rep. 482: "In many cases proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity." This is not a case falling within the exceptions named by Justice Field. Here the city of Bisbee, through its officers, is in good faith endeavoring to enforce a penal ordinance passed under the belief that it was a *bona fide* exercise of legislative power. Had it been made to appear that the common council of the city of Bisbee, "under the pretense of seeking the good of that particular portion of society which is intrusted to its supervision," was attacking the vested property rights of the appellees, a different solution of this case would be necessary—equity would disregard the form of the transaction and consider its real purpose and substance. Before an injunction will issue to restrain officers from making an arrest for an alleged violation of law, the arrest must not only be illegal, but must be accompanied by interference with property rights. 22 Cyc. 905.

It might develop in a trial in the proper courts that foreign insurance companies that have paid to the state the percentage provided for in paragraph 813, Revised Statutes of Arizona of 1901, have a property right to carry on the business of insurance in all parts of the state without additional burdens in the way of licenses on their agents, yet it cannot be that appellees have a vested property right to transact that business. Their agency may be revoked at any time. They have no investment in the insurance business that may be ruined or depreciated. Their sole stock in trade is the right to solicit insurance and collect premiums. The loss sustained by the appellees by reason of a cessation of work during the time required to test the ordinance in the proper courts is purely speculative. In any event, at the end of such litigation they will have their property—the right to solicit insurance—unimpaired, save the contingency of its revocation by their principals. The only loss they are likely to suffer is the commissions on policies that they might have written in the interim.

The judgment of the trial courts is reversed, and the case remanded, with direction that the complaint be dismissed.

HORSE SHOE CLUB v. STEWART.

(Supreme Court of Missouri, 1912, 242 Mo. 421, 146 S. W. 1157.)

FERRISS, P. J.—Bill for injunction filed in the circuit court of the city of St. Louis in November, 1907, by the Modern Horse Shoe Club, a corporation organized under the statutes relating to fraternal and benevolent organizations, and against the members of the board of police commissioners of the city of St. Louis, the chief of police, and one Gaffney, captain of police, commanding in the eighth police district of said city.

The bill alleges that the plaintiff is authorized to maintain and does maintain on the premises, number 2309 Chestnut street, in said city, a club house, consisting of twelve rooms, with furniture, fixtures and appurtenances; that the membership of the club is limited to male negro citizens of said city of good moral character, who believe in the teachings and principles of good government, and that its members are and were at all times so qualified; that each member paid an initiation fee of one dollar, and dues of one dollar every three months; that the expense of maintaining the club is derived from the fees and dues aforesaid, and from the distribution of food and drink furnished to its members; that in order to maintain itself and pay its expenses and indebtedness it is necessary that plaintiff should be enabled to furnish its members with club accommodations and facilities, and dispose of its supplies on hand to its members; that on several occasions the defendants raided and caused to be raided the club house and premises, and wrongfully and wantonly, and without process of law, arrested and caused to be arrested members of said club under the false charge of vagrancy; that said defendants have threatened and are now threatening to arrest each and every one of plaintiff's members found in said club house, and prosecute them under the false charge of idling; that by so doing they have terrorized the members of the club and prevented them from using and enjoying the club and its facilities; that the defendants have caused, and are now causing daily, the police officers of the city to visit the premises of the club, without any reason therefor, and for the only purpose of terrorizing the members of said club and disrupting said organization; that de-

defendants are threatening to continue said illegal raids and unlawful arrests so long as plaintiff operates its club house, and have ordered the officers of plaintiff to close its said club house under threat of arrest and prosecution. Plaintiff further alleges that its organization was made in good faith; that it maintains its club house in good faith, that at no time has anything unlawful or improper occurred therein; that its members are not vagrants, but law-abiding, industrious and hard-working men, and that they only enjoy, and will be permitted to enjoy, such privileges as plaintiff is authorized to furnish them by the terms of its charter, and that plaintiff has at no time exceeded its rights under its charter; that if defendants are permitted to carry their said illegal threats into effect, the result will be irreparable damage to plaintiff, and will deprive plaintiff's members of the rights and privileges to which membership in plaintiff's organization entitles them, and in the enjoyment of which they have a right to be protected by law.

Wherefore plaintiff prays a perpetual injunction against the defendant, restraining them from in any way molesting or interfering with plaintiff's members, officers or agents in or about said club, because of their being there, or on any false and pretended charge of vagrancy.

On the filing of this petition a temporary injunction was issued as prayed for.

The answer of the defendants denies each and every allegation in the petition, and for further answer alleges that plaintiff is not the real party in interest; that the plaintiff does not come into a court of equity with clean hands; that the pretended plaintiff corporation was not and has not been, up to the filing of this suit, conducted as a benevolent, religious, scientific, fraternal-beneficial, or educational institution or corporation, but for the purpose of evading the statutes of the State and the ordinance of the city of St. Louis relating to dramshops and the sale of intoxicating liquors; that the said pretended club was constantly being conducted for the aforesaid unlawful ends, up to the time of the filing of this suit; that said club has frequently been resorted to by, and has been the common lounging place and rendezvous of ex-convicts, thieves, vicious and dissolute women and other criminal characters of the negro race, and that the said pretended club is controlled and operated for purpose of private, pecuniary gain by one

Ollie Jackson, with the aid and assistance of persons to defendants unknown, and was organized by him shortly after his release from serving a term in the State penitentiary; that prior to and up to the filing of plaintiff's petition, said premises were the nightly scene of gambling, disturbances of the peace, and violations of the laws of the State relating to the sale of liquor, and was not a bona fide club, conducted for the sole use and benefit of its members, and that said pretended club has since the date of its organization, been what is popularly known as a lid-lifting club, and ought not to be protected by the court.

To this answer plaintiff filed a general denial.

The cause was heard at great length upon the facts, at the conclusion of which the court rendered a decree dismissing the bill as to all the defendants except Gaffney, and perpetually enjoining defendant Gaffney, his successors in office and subordinates, and the officers and men of the police force under them, from raiding or arresting, or in any way molesting or interfering with, plaintiff's members, its officers, agents, employees or servants, while in or about plaintiff's club house and premises, solely because of their being there, or from arresting on the premises of plaintiff said members on any false or pretended charge of vagrancy. Defendant appeals.

The evidence substantially sustains the allegations of the answer, and shows that the corporate form was used as a cloak under which the so-called club engaged in the sale of liquor in violation of law. Practically the only activities conducted in the club consisted in the selling of liquor and card playing. Liquor was sold over a counter in a room fitted up like an ordinary barroom, and was sold for cash at the same prices charged in licensed saloons. Such sales were conducted on every day of the week, including Sunday, and all night long. The evidence, on the other hand, shows that the police, acting under instructions from defendant Gaffney, attempted to break up this club by repeated raids and arrests made for that avowed purpose; that members were arrested as vagrants, and the charges subsequently dismissed; that such arrests were made not for the purpose of prosecution on charges of vagrancy, but for the sole purpose of breaking up the club. It further appears that the police entered the premises peaceably, quietly and without opposition, and that no injury was done or threatened to the physical property of the club.

The learned chancellor who tried the case below indicated very clearly in his opinion that he regarded the testimony sufficient to forfeit plaintiff's charter in a proper proceeding for that purpose, but condemned in vigorous language, as illegal, the methods instituted by the police to break up this establishment, and suggested that the proper method is by a proceeding in quo warranto. He held, properly that in the city of St. Louis the police may, without a warrant, make an arrest upon a well grounded suspicion that a crime, either felony or misdemeanor, has been committed. He was, however, of the opinion that repeated raids and arrests, upon charges of vagrancy, which were made for the avowed purpose of breaking up the club, and not for bona fide prosecution, were continuing trespasses which equity should enjoin, even conceding the truth of the allegations of the answer.

Without criticising the conclusions reached below as to the rights and duties of the police, and the character of their acts complained of, we are of the opinion that the chancellor did not give sufficient consideration to the question preliminary to all others, i. e., does the plaintiff show that its own conduct has been such as to justify it in asking relief in equity? In other words, does plaintiff come before the court with clean hands regarding the matter in controversy? This is not a proceeding instituted in behalf of individual members of the club who claim to have suffered from illegal arrests made by the police. The plaintiff invokes the aid of the court of equity to protect it in the exercise of rights which had been granted it by law. Such is the distinct claim of the bill. The court is not asked to punish the police officers for oppression in office, nor to mulct them in damages for injuries to the rights of plaintiff or its members. Its aid is invoked to protect plaintiff's right to exercise its functions as a club under the authority of its charter.

The first question to be considered is, whether such right of plaintiff is involved in this controversy. In this matter we must be governed, not by the allegations of the bill as to the rights of plaintiff under its charter, but by the proof as to what rights in point of fact are threatened with destruction by the actions of the police. The only "right" which plaintiff has exercised and desires to continue to exercise is the right to sell liquor in violation of law. If the efforts of the police are successful and result in breaking up the establishment, this

is, according to the evidence, the only substantial privilege that will be affected. Therefore, this suit in effect asks the court to protect plaintiff in its continued violation of law. The very statement of this proposition suggests the answer. The necessary effect of this injunction is to permit the plaintiff to continue to sell liquor without a license, and otherwise violate the law. We do not mean to say that the police are justified in resorting to illegal means to break up an illegal business, but we do mean to say that an illegal business cannot invoke the aid of a court of equity to continue its existence. If the police have adopted a high handed and even illegal method of procedure, the law affords a remedy, either by prosecution for the crime of oppression in office or by suit for damages. If the legal rights of a plaintiff are invaded, and there is no adequate relief at law, a court of equity will protect such rights by injunction, even if such protection require it to enjoin acts criminal in character. The primary question is not whether defendant has committed crime, or whether he is a trespasser. The first pertinent inquiry is, whether plaintiff has shown itself to be in the exercise of legal rights which will be destroyed without the intervention of a court of equity. If this inquiry is answered in the negative, the relief should be denied. The plaintiff in preparing its bill, very properly realized that it must show that the rights for which it was seeking protection were within the law. It therefore alleges that its organization was made in good faith; that nothing unlawful or improper had occurred, or would occur, within its club rooms; that its members were law-abiding, industrious, hard-working men, and that they enjoyed, and would be permitted to enjoy, only such privileges as plaintiff was authorized to furnish by the terms of its charter, and that plaintiff has at no time exceeded its rights under its charter.

And what is the threatened injury? Here is the allegation in the bill on this point: "The result will be irreparable damage to plaintiff, and will deprive plaintiff's members of the rights and privileges to which membership in plaintiff's organization entitles them, and in the enjoyment of which *they have a right to be protected by law.*"

The bill clearly demands protection for such rights only as are granted plaintiff by its charter. The case breaks on this point. The evidence not only does not sustain these allegations of the bill, but

shows clearly, and without substantial dispute, that the so-called rights now sought to be protected are simple violations of law.

In the case of *Weiss v. Herlihy*, 23 App. Div. (N. Y.) 608, under facts quite similar to those in this case, the court uses this language, which we consider entirely proper here: "This plaintiff, according to the testimony made to appear upon this record, is persistently and flagrantly using these premises for a disorderly house in violation of the statute. He asks the help of the equitable power of the court practically for the purpose of permitting him to continue that violation of law. It is apparent that an injunction could have no other effect, and that just as soon as the observation and inspection of the police was withdrawn from this place, this gambling house would be reopened, to the scandal and inconvenience of the neighborhood. A court of equity will not permit its process to be perverted to any such purpose. Assume that the legal rights of this plaintiff are being infringed. If that be true, he must enforce them by the proper proceedings at law, and if he can do so, undoubtedly his rights will be protected or he will be recompensed for any violation of them; but if the law affords him no protection, equity will certainly not help him by putting its hand upon the officers of the law who are seeking to perform their duty—although possibly in a manner oppressive to this plaintiff—and restraining them for no other purpose than that this man may go on with his violations of the law unmolested and unwhipped of justice."

To the same general effect are *Beck v. Flourney Live-Stock Co.*, 65 Fed. 30; *Pon v. Wittmen*, 147 Cal. 280; *Pittsburg Ry. Co. v. Town of Crothersville*, 159 Ind. 330.

What we say in this opinion cannot be construed as a justification of illegal methods, if any, adopted by the police. As a court of equity, we refuse relief to plaintiff, not because some of its members are bad men; not because its manager and practical owner is an ex-convict; not merely because the evidence shows good grounds to forfeit its charter; not because we justify the action of the police; but because the plaintiff does not come into court with clean hands concerning the very subject-matter of this controversy, namely, its legal rights under its charter, and because it is not the province of equity to assist a wrongdoer in violating the law.

The judgment is reversed and the bill dismissed. Kennish and Brown, JJ., concur.

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